(30)

No. 96-553-CFX Title: Chancellor, Board of Education of the City of New York, et al., Petitioners
v.
Betty-Louise Felton, et al.

Docketed:
October 9, 1996 Court: United States Court of Appeals for the Second Circuit

Vide:
96-552

Entry	Date	Proceedings and Orders
	Oct 7 1996	Petition for writ of certiorari filed. (Response due November 23, 1996)
	Oct 7 1996	Appendix of petitioner filed.
	Oct 29 1996	Brief of respondent Secretary of Education filed. VIDED.
	Nov 1 1996	Order extending time to file response to petition until November 23, 1996.
	Nov 1 1996	Order extending time to file consolidated response to petition for writ of certiorari to and including November 23, 1996.
	Nov 25 1996	Brief amicus curiae of National Jewish Commission on Law and Public Affairs filed. VIDED.
	Nov 25 1996	Brief of respondents Betty-Louise Felton, et al. in opposition filed. VIDED.
	Dec 9 1996	Reply brief of petitioners Chancellor, Bd. of Education of the City of New York, et al. filed.
	Dec 11 1996	Reply brief of petitioners Rachel Agostini, et al. filed. VIDED.
	Dec 30 1996	DISTRIBUTED. January 17, 1997
	Jan 17 1997	Petition GRANTED. In addition to the questions presented by the petition, the parties are requested to brief and argue the following question: "Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief petitioner seeks." The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 28, 1997. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 28, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 9, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT April 15, 1997. **********
	Feb 27 1997	Brief amici curiae of Institute for Justice, et al. filed. VIDED.
	Feb 27 1997	Motion of Sarah Peter, et al. for leave to file a brief as amici curiae filed.
	Feb 28 1997	Joint appendix filed. VIDED.
	Feb 28 1997	Brief of petitioners Chancellor and Board of Education of the City of New York filed. VIDED.
	Feb 28 1997	Brief of petitioners Rachel Agostini, et al. filed. VIDED.
	Feb 28 1997	Brief amicus curiae of National Jewish Commission on Law and Public Affairs filed. VIDED.

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No. 96-553-CFX

Entry	Date	Proceedings and Orders
	Feb 28 1997	Brief amicus curiae of U.S. Senator Robert F. Bennett filed. VIDED.
	Feb 28 1997	Brief amicus curiae of United States Catholic Conference filed. VIDED.
	Feb 28 1997	Brief amici curiae of Christian Legal Society, et al. filed. VIDED.
	Feb 28 1997	Brief amicus curiae of Becket Fund for Religious Liberty filed. VIDED.
	Feb 28 1997	Brief amicus curiae of Secretary of Education filed. VIDED.
	Feb 28 1997	Brief amicus curiae of Knights of Columbus filed. VIDED.
	Mar 6 1997	CIRCULATED.
	Mar 7 1997	Record filed.
	Mar 19 1997	Motion of the Acting Solicitor General for divided argument filed.
	Mar 24 1997	Motion of Sarah Peter, et al. for leave to file a brief as amici curiae GRANTED.
	Mar 27 1997	Brief amici curiae of American Jewish Congress, et al. filed. VIDED.
	Mar 27 1997	Brief amicus curiae of New York County Lawyers Assn. Comm. on Supreme Court of U.S. filed. VIDED.
	Mar 28 1997	Brief of respondents Betty-Louise Felton, et al. filed. VIDED.
	Mar 28 1997	Brief amici curiae of Americans United for Separation of Church and State, et al. filed. VIDED.
	Mar 28 1997	Brief amici curiae of Council on Religious Freedom, et al. filed. VIDED.
	Mar 31 1997	Motion of the Acting Solicitor General for divided argument GRANTED.
	Apr 9 1997	Reply brief of petitioners Rachel Agostini, et al. filed. VIDED.
	Apr 9 1997	Reply brief of petitioners Chancellor and Board of Education of the City of New York filed. VIDED.
	Apr 9 1997	Reply brief of petitioner Secretary of Educaton filed. VIDED.
	Apr 15 1997	ARGUED.
	Apr 17 1997	Record filed.

(1)

Supreme Court, U.S.
FILED
OCT 7 1996
OFFICE OF THE CLERK

No. 96 553

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK et ano.,

Petitioners,,

- against -

BETTY LOUISE FELTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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REPRODUCED ON RECYCLED PAPER

35 pp

QUESTION PRESENTED

Whether the Court should reconsider its holding in Aguilar v. Felton, 473 U.S. 402 (1985) that municipal petitioners may not, consistent with the Establishment Clause of the First Amendment, provide federally-funded remedial and educational services through petitioners' professional employees to eligible students on the site of parochial schools which such students attend ?

PARTIES TO THE PROCEEDING

Petitioners are the Chancellor of the Board of Education of the City of New York and the Board of Education of the City School District of the City of New York. They were defendants-appellants in the Court of Appeals. Betty Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side and Allen H. Zelon are respondents and were plaintiffs-cross-appellants in the Court of Appeals.

The Secretary of Education is a respondent and was a defendant-appellee in the Court of Appeals. Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnation, Maria L. Fernandez, Dolly Cutrera Then and Joseph M. Then, Margaret Figueora, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens, and

Rosemarie Vasquez, respondents on the petition, were intervenors-defendants-appellants in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Chancellor of the Board of Education and Board of Education of the City of New York respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered on August 30, 1996. We are informed that the Defendants-Intervenors are also petitioning for certiorari from the same decision.

OPINIONS BELOW

The order of the Court of Appeals, which under its rules will not be reported in the Federal Reporter, is reprinted in the Appendix to the Petition ("App.") at pp. A2-A5. The decision of the United States District Court for the Eastern District of New York, which is unreported, is contained in the Appendix at pp. A6-A21.

This Court's prior opinion in this case, Aguilar v. Felton, is reported at 473 U.S. 402.

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 1996. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant Provisions of Title I of the Improving American Schools Act of 1994

20 U.S.C. § 6321, Participation of children enrolled in Private Schools

(a) General Requirement

(1) In general

To the extent consistent with the number of eligible children identified under section 6315(b) of this title in a local educational agency who are enrolled in private elementary and secondary schools, a local educational agency shall, after timely and meaningful consultation with appropriate private school officials, provide such children, on an equitable basis, special educational services or other benefits under this part (such as dual enrollment, educational radio and television, computer equipment and materials, other technology, and mobile educational services and equipment).

(2) Secular, neutral, nonideological

Such educational services or other benefits, including materials and equipment, shall be secular, neutral, and nonideological.

(3) Equity

Educational services and other benefits for such private school children shall be equitable in comparison to services and other benefits for public school children participating under this part.

(4) Expenditures

Expenditures for educational services and other benefits to eligible private school children shall be equal to the proportion of funds allocated to participating school attendance areas based on the number of children from low-income families who attend private schools.

(5) Provision of services

The local educational agency may provide such services directly or through contracts with public and private agencies, organizations, and institutions.

(b) Consultation

(1) In General

To ensure timely and meaningful consultation, a local educational agency shall consult with appropriate private school officials during the design and development of such agency's programs under this part, on issues such as --

(A) how the children's needs will be identified;

(B) What services will be offered;

(C) how and where the services will be provided;

(D) how the services will be assessed; and

(E) the size and scope of the equitable services to be provided to the eligible private school children, and what is the proportion of funds allocated under subsection (a)(4) of this section for such services.

* * *

(c) Public control of funds

(1) In general

The control of funds provided under this part, and title to materials, equipment, and property purchased with such funds, shall be in a public agency, and a public agency shall administer such funds and property.

* * *

20 U.S.C., § 6322 Fiscal Requirements

* * *

(b) Federal funds to supplement, not supplant, non-Federal funds

(1) In general

(A) Except as provided in subparagraph (B), a State or local educational agency shall use funds received under this part only to supplement the amount of

funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds.

(B) For the purpose of complying with subparagraph (A), a State or local educational agency may exclude supplemental State and local funds expended, in any eligible school attendance area or school for programs that meet the requirements of section 6314 or 6315 of this title.

* * *

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief and subject matter jurisdiction is invoked under 28 USC § 1331 because the action arises under the United States Constitution and federal law. In Aguilar v. Felton, 473 U.S. 402 (1985), this Court, by a 5-4 majority, held the City's method of expending federal Title I funds on needy students in parochial schools violated the Establishment Clause because Board of Education teachers and other

professionals provided their remedial and related educational services on the premises of parochial schools. The program involved in that case, originally enacted as Title I of the Elementary and Secondary Education Act of 1965, and later superseded by Chapter 1 of the Education Consolidation Act of 1981, authorized the Secretary of Education to distribute financial assistance, through the states, to local educational institutions to meet the needs of educationally deprived children from low-income families.

Pursuant to Title I, federal funds were provided for remedial, supplementary education and support services for elementary and secondary school students. App., p. A32. Although the statutory scheme considered in Aguilar has been superseded by subsequent legislation, most recently by Title I[1] of the Improving America's Schools Act of 1994,

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[1] For purposes of clarity, all references to the statutory (continued...)

codified at 20 U.S.C. § 6301 et seq, the provisions relating to private school students have remained essentially unchanged. Title I benefits are available to all eligible students including those who attend parochial schools. 20 U.S.C. § 6321. Title I funds can be used only to supplement, not to supplant, the public or private school student's regular classroom work. See 20 U.S.C. § 6322(b). Title I services provided to private school students must be "equitable" in comparison to services provided to participating public school students. 20 U.S.C. § 6321(a)(3), (d): 60 Fed. Reg. 34800, 34807-08 (July 3, 1995) (to be codified at 34 C.F.R. 200.10-11). All services and materials provided with Title I funding must be secular, neutral and nonideological, and the control of all funds and

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[1] (...continued)
schemes in effect at various times will be by the term "Title I."

title to all equipment provided under Title I must be in a public agency. 20 U.S.C. § 6321(a)(2) & (c)(1).

Beginning in 1966, the City's Board of Education provided Title I services on premises to students at private schools, during the school day. App., p. A39. This was done only after attempts to provide the services by alternative means, including providing the services after the school day, proved unsuccessful. Aguilar, 473 U.S. at p. 423; App., pp. A37-39. Under its on-site program, the administrators of the parochial schools were required to clear the classrooms used by the public school professionals of all religious symbols. All materials and equipment funded by Title I were used only for the program's purposes. Aguilar, p. 407. Most of the teachers were of a different faith than the students they taught and there was no evidence that any teacher had ever tried to inculcate religious beliefs. Ibid., p. 431. The on-site program was

very successful, and participating private school students showed measurable improvement in overcoming their educational achievement deficits. App., pp. A39-40.

Despite the contours of Title I and the Board's program, and the efforts of the Board's teachers which Justice O'Connor described as "praiseworthy," (Aguilar, p. 431), the Court, applying the Lemon test (Lemon v. Kurtzman, 403 U.S. 602 [1971]), invalidated the City's program because of excessive Church and State entanglement. 473 U.S. at 409-414.

After issuance of this Court's opinion in September 1985, a judgment was entered in the United States District Court for the Eastern District of New York, containing an injunction prohibiting the Secretary of the Department of Education and the Chancellor of the Board of Education of the City of New York from using public funds for any Title I program to the extent it authorizes public school teachers

and counsellors to provide professional services on the premises of sectarian schools in New York City. App., pp. A22, A25-26. As a result the Chancellor and the Board have sought to provide the Title I services through alternative means, which have proven to be both less effective and more expensive than the on-site program which existed for 20 years prior to Aguilar.

The Board has used four alternative methods of providing Title I services to private school children, which in the 1984-85 school year included approximately 22,000 students, the great majority being parochial school students. App., pp. A41, A43-44. After Aguilar there was a drop-off in private school participation, but by 1993-94, the number again approached 22,000, out of a total New York City Title I population, in both public and private schools of approximately 260,000. App., pp. A35, A80.

The alternatives are public school sites, leased sites, Mobile Instruction Units ("MIU's"), and Computer Assisted Instruction ("CAI"). Because of severe overcrowding at the Board's public schools as a result of a growing public school population, as well as problems caused by travel between the private and public schools, the use of public school sites has decreased so that while in 1985/86 approximately 3500 private school students obtained Title I services at public school sites, by the 1993-94 school year, approximately 1200 students received services at public school sites. App., pp. A45-49. Furthermore, private school participation in Title I decreased sharply in the initial years after Aguilar, at least partly because of dissatisfaction with the public school sites. App., pp. A47-49, A133-135. The leased sites have been a limited resource for Title I services due to the unavailability of appropriate sites. App., pp. A59-62. In 1993-94,

approximately 1600 private school students received their Title I services on leased sites. App., pp. A61-62.

The remaining two alternatives, which the Chancellor has been forced to use, are Mobile Instruction Units and Computer Assisted Instruction. Both are unsatisfactory. An MIU is really an expensive bus turned into a classroom, while CAI is a depersonalized, electronic teacher. In 1986-87, approximately 3500 private school students were receiving their Title I services in MIU's; by 1993-94, approximately 11,600 students, or more than half of the private school students receiving Title I assistance, received them in MIU's. App., pp. A35, A58.

The MIUs are very expensive. The Board leases MIUs from a private company at an annual cost of $106,934 per vehicle. App., p. A87. The total cost for leasing MIUs through the first 8 years of the post-Aguilar program was $83,729,440. App., pp. A84, A99. In 1994-

95, the Board leased 126 MIU's. App., p. A58. The contract requires the MIU supplier to provide garage, maintenance, repair, cleaning, and insurance for the MIU. App., p. A54. The supplier must also provide a driver who remains at the MIU during the school day to provide security. App., p. A55.

In order to maximize the efficient use of MIUs, each vehicle contains a folding partition. When the partition is closed, one section of the MIU can accommodate a class of up to 10 students, which is the maximum class size with one teacher permitted under the New York State Education Department ("SED") Guidelines. The smaller section can be used for activities such as counseling, "English as a Second Language" classes, parent-teacher conferences, or staff conferences. App., pp. A53-54.

MIUs lack many of the amenities which are accessible in the traditional school environment. First,

MIUs lack telephone services. Each vehicle is equipped with a walkie-talkie, which is used in case of an emergency. Second, MIUs lack bathroom facilities. Third, due to safety considerations, windows in the MIU classroom area are small and covered with a heavy wire grid. Fourth, there is limited storage space for equipment and supplies. Fifth, MIUs lack an external source of electrical power. App., pp. A55-57.

During school hours, the MIU is parked on a public street near the private school. MIUs are not permitted to be parked on private school property. Instead, they are generally parked on the same block as or around the corner from the private school. App., p. 57. These children are thus forced to leave the school and go to the bus, highlighting that they are in need. This is demeaning.

The Board's final alternative means of supplying Title I services to the private school students is Computer-

assisted instruction, or "CAI." CAI provides private school students with Title I instruction via computers that are linked by modems or by dedicated telephone lines to a Board office. By 1994, 9,662 private school students were served by CAI; of those, 2,115 students received CAI services in conjunction with face-to-face services provided at either public school sites, leased sites or MIU's; this combination service was provided in response to Title I achievement tests which showed that students who receive their Title I services only by CAI do not as a group make as much educational progress as students who have the benefit of personal instruction by teachers. App., pp. A62, A68-70.

The Board's Title I teachers are not present in the private school during CAI sessions. When students use the computers, their work product is transmitted electronically to a centralized Board office where Title I instructors

monitor the students' work, report on their progress, and adjust each student's curriculum as appropriate. App., pp. A62-63. The only Board employee who is present in the CAI room during Title I sessions is a CAI computer technician. App., p. A63.

Compliance with Aguilar has been very expensive. For the school years 1986-87 through 1993-94, the Board spent $93,245,424 for the additional costs of complying with Aguilar. App., pp. A77, A97. $83,729,440 of that amount was spent in leasing MIU's. App., pp. A84, A99. Under regulations promulgated by the Secretary of Education, the non-instructional administrative costs of complying with Aguilar must be taken "off the top" of the Local Educational Agency or LEA's total allocation of Title I funds. App., pp. A81-82, A157-158; See 60 Fed. Reg. at 34810 (to be codified at 34 C.F.R. 200.27(c)). Thus such costs of complying with Aguilar reduce the amount of

Title I funds available for both public and private school students. Both the State of New York and Congress, in response to Aguilar, made funds available for such Aguilar-related capital expenses. App., pp. A78-79, A97. Furthermore, certain "carryover funds" were available from prior years because of the decrease of participation by private school students in New York City after Aguilar, App., p. A80, but state funds were eliminated in 1991, and the "carry-over" funds were almost exhausted at the time this motion was made. App., pp. A82-84. For example, in 1995/96, the Board budgeted approximately 16 million dollars for such capital expenses of complying with Aguilar and was required to use almost 6 million dollars "off-the-top" of its Title I allocation for such expenses. App., p. A159.

The post-Aguilar means of providing Title I services to private school students are less educationally effective

than the on-site program. The use of MIU's, leased sites and public school sites involves the loss of instructional time because of the movement of students out of the private schools. The bus in itself is an inadequate school location. App., pp. A71-72. Necessary coordination between the Title I teacher and the private school staff is made more difficult. App., pp. A73-76. As discussed above, CAI is not as educationally effective as personal instruction by a teacher. App., p. A69.

Compliance with Aguilar is a nationwide problem. In October, 1995, the Secretary of Education issued a statement in which he pointed out that hundreds of million of dollars had been spent by school districts to comply with Aguilar, and described Aguilar as having a "significant negative impact on Title I services for the neediest children in both public and private schools." App., p. A157, A159.

Secretary Riley called for reconsideration of Aguilar in an appropriate case. App., p. A157, A161.

On June 7, 1995, the Board of Education passed a resolution authorizing their counsel to commence legal proceedings to seek reconsideration of Aguilar. In its resolution, the Board noted both the great financial costs and the educational disadvantages of the present means of delivering Title I services to private school students. App., pp. A163-170. Thereafter, the Chancellor and the Board moved pursuant to Rule 60 (b) for relief from the District Court judgment.

DECISIONS BELOW

Although the District Court recognized that the Board's present program of delivering Title I services to parochial school students constituted an "indisputably enormous expense," the Court denied the motion because Aguilar has not been explicitly overruled. App., pp. A11,

A20. The Court, however, found that the Board and Chancellor had followed the proper procedure in moving under Rule 60(b), and that the motion should not be denied as untimely. App., pp. A14-20. Indeed, the Court noted that there "could scarcely be a more appropriate vehicle" for reconsideration of Aguilar than the same case in which the Board "is struggling with the consequences of ... [that] ... decision." App., p. A21.

On appeal, the Court of Appeals affirmed, substantially for the reasons stated by the District Court. App., pp. A2-4.

REASONS TO GRANT WRIT

In Aguilar, this Court, by a bare 5-4 majority, struck down a program described by then Chief Justice Burger as one that "has done so much good and little, if any, detectable harm." 473 U.S. at 420, quoting Felton v. Secretary, United States Department of Education, 739 F.2d

48, 72 (2d Cir., 1984). Indeed, as Justice O'Connor stated, in the 19 years of the Board's on-site program, there had never been an incident in which a Title I instructor had even subtly attempted to indoctrinate a student in any religious tenet. 473 U.S. at 424. It was also clear at that time that the alternative methods of providing the Title I services would be more expensive and less effective than the on-site program. Ibid.

In Board of Education of Kiryas Joel v. Grumet, __ U.S. __, 114 S.Ct. 2481 (1994), a case based on facts which are directly attributable to Aguilar, five members of the Court explicitly stated their wish to reconsider Aguilar. Ibid., p. 2498 (O'Connor, concurring); Ibid., p. 2505 (Kennedy, concurring); Ibid., p. 2515 (Scalia dissenting, joined by Rehnquist and Thomas). In light of the record established on our motion in the District Court, that judgment is correct and Aguilar should be reconsidered.

The post Aguilar history confirms what was foreseen at the time of the decision. The Department of Education, based on a study by the General Accounting Office, estimates that the nation's school districts have spent hundreds of millions of dollars in non-instructional costs in order to comply with Aguilar. App., p. A159. In times of ever-scarcer governmental resources, such funds were not used to improve the educational services needed by these children, but for the abstract and dubious benefit of making these students leave their schools to receive services at supposedly "neutral" sites. This method of providing the remedial services provides no tangible benefit to the students, and is a less educationally effective means of providing the services. App., pp. A70-77, A160-161.

Aguilar has also led to constitutional difficulties. In Kiryas Joel, supra, New York State set up a separate school district for a Hasidic Jewish community, in an attempt to

accommodate the unique religious beliefs of that sect in the face of the constraints of Aguilar. This Court struck down the school district as a violation of the Establishment Clause, and Justices O'Connor and Kennedy, who called for the reconsideration of Aguilar, concurred in that determination. Ibid., pp. 2495-2500 (O'Connor, J.) and 2500-2505. (Kennedy, J.).

Since Aguilar, this Court has taken a more realistic and less doctrinaire and accommodating approach to a claimed Establishment Clause violation in the area of educational assistance. In Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993), the Court held that the Establishment Clause was not violated by providing a publicly-employed sign language interpreter to a deaf student attending a Catholic high school. Not only would the state-employed interpreter be in the religious school throughout the regular school day, but he or she would be

required to communicate verbatim the material covered in religion class, daily Mass, and the "nominally secular subjects that are taught from a religious perspective." 509 U.S. at 19 (Blackmun, J., dissenting). The Court found no Establishment Clause violation because the service was provided pursuant to a general government program (the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq, and an Arizona statute) that distributed benefits on a neutral basis to all qualifying children; the presence of the interpreter on the sectarian school premises was the result of parental, not governmental, choice, thus providing no financial incentive to use the sectarian school; and no government funds reached sectarian coffers. 509 U.S. at pp. 10-11. We believe that under this analysis, the Board's on-site program, struck down in Aguilar, would pass constitutional muster. While the Court did point out that a sign-language interpreter is different from a teacher

or counsellor, 509 U.S. at 13, this factor was not part of its core legal analysis; in light of the history of the Board's program, such distinction does not constitute a basis for denying remedial education to needy students.

Similarly, in Rosenberger v. Rector and Visitors of the University of Virginia, __ U.S. __, 115 S.Ct. 2510, 2521 (1995), the Court emphasized that "a central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." The ruling in Aguilar gave no weight to this "significant factor," although faced with a national program aimed at assisting needy children regardless of the religious or secular nature of the school they attend.

Compliance with Aguilar has created substantial economic, educational, and constitutional difficulties and is thus ripe for reconsideration. It is submitted that this case

is the best vehicle for such reconsideration. It would put before the Court the history of a program which, for almost twenty years prior to Aguilar, served students on the premises of secular schools without any discernable religious effect, and for about ten years encountered the difficulties of complying with that decision. Indeed, on our Rule 60(b) motion, we submitted a copy of the Joint Appendix submitted on the argument of Aguilar. As the largest Title I program in the nation, with a great number of both public and private school students eligible for Title I assistance, the petitioners' program presents a paradigm of the unfortunate effects of Aguilar.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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October 4, 1996

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(1) No. 96 553 OCT 7 1996

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

OFFICE OF THE CLERK

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK et ano.,

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- against -

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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ORDER OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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	SUMMARY ORDER
BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,	Nos. 96-6160, 6180, 6181

Plaintiffs-Appellees-Cross-Appellants,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,

Defendant-Appellee,

CHANCELLOR BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants-Appellants-
Cross-Appellants

- against -

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RACHEL AGOSTINI, MARIA COSARCA, DIGNA DURAN, IVETTE ENCARNACION, MARIA SEJOUR, JOAN JACKSON, CHERYL MALCOUSU, TONYA STEVENS and ROSEMARIE VASQUEZ,

Defendants-Intervenors-Appellants-Cross-Appellants.

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P R E S E N T:

HONORABLE AMALYA L. KEARSE,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges

HONORABLE MILTON POLLACK,
District Judge.[1]

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[1] Honorable Milton Pollack, of the United States District Court for the Southern District of New York, sitting by designation.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of August, one thousand nine hundred and ninety-six.

Appearing for Defendants-Appellants:	Stephen J. McGrath, Deputy Chief, NYC Corp. Counsel, N.Y., N.Y.
Appearing for Intervenors-Appellants:	Kevin T. Baine, Williams & Connelly, Washington, D.C.
Appearing for Defendant-Appellee	Howard S. Scher, U.S. Dep't of Justice, Washington, D.C.

Appearing for Plaintiffs-Appellees: Stanley Geller, N.Y., N.Y.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was submitted by counsel for appellee United States Department of Education and was argued by counsel for the other parties.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed substantially for the reasons started in Judge Gleeson's Memorandum and Order dated May 20, 1996.

AMALYA L. KEARSE,
U.S.C.J.

J. DANIEL MAHONEY,
U.S.C.J.

MILTON POLLACK,
U.S.D.J.

MEMORANDUM AND ORDER OF DISTRICT COURT

No. 78-CV-1750

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, U.S. DEPARTMENT OF EDUCATION, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants.

RACHEL AGOSTINI, et al.,

Defendant-Intervenors.

MEMORANDUM AND ORDER

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JOHN GLEESON, United States District Judge:

This case concerns the use of federal funds to provide remedial education to educationally deprived children in low-income neighborhoods. There have been prior decisions in the Second Circuit and the United States Supreme Court,[2] familiarity with which is assumed.

Briefly, for some 30 years, federal funds have been allocated to local school boards for remedial education programs pursuant to Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801 et seq., and its predecessor, Title I of the Elementary and Secondary Education Act of 1965. The

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[2] Felton v. Secretary of Dep't of Education, 739 F.2d 48 (2d Cir. 1984), aff'd sub nom Aguilar v. Felton, 473 U.S. 402 (1985).

program will be referred to herein as the "Chapter 1" program.

The remedial instruction and other support services funded by the Chapter 1 program were (and still are) intended by Congress to benefit all eligible school children, whether or not they attend public schools. The defendant Chancellor of the Board of Education (the "Board"), the "local education agency" that proposed and implemented the Chapter 1 program for New York City, has provided in-school remedial instruction to public school students since the federal program began. Until 1985, the Board provided in-school remedial education instruction to qualifying private school students as well. However, the practice of sending public school teachers and guidance counselors into New York's private schools, the overwhelming majority of which are religious schools, was challenged on Establishment Clause grounds, and the

Supreme Court agreed with plaintiffs that this use of public funds violated the First Amendment. Aguilar v. Felton, 473 U.S. 402 (1985).

On remand, this Court (Hon. Edward R. Neaher) issued an order, dated September 26, 1985, permanently enjoining the New York City Board of Education from using Chapter 1 funds to send teachers or guidance counselors into these religious schools. The Board has since devised several alternate (and mostly off-premises) methods of delivering these services to religious school students, the validity of which is not at issue here.

In the years since the Supreme Court's Aguilar decision, the landscape of Establishment Clause decisions has changed. The life expectancy of Aguilar itself is, to put it mildly, subject to question. Indeed, three justices of the Supreme Court have declared that Aguilar "should be overruled at the earliest opportunity." Board of Education

of Kirvas Joel v. Grumet, 114 S.Ct. 2481, 2515 (1994) (Scalia, J., dissenting (joined by Chief Justice Rehnquist and Justice Thomas)). A fourth, who dissented in Aguilar, has expressed a desire to reconsider it and has strongly indicated that it should be overruled. Id. at 2498 (O'Connor, J., concurring). Finally, a fifth justice has stated that the Aguilar decision "may have been erroneous," and that it may be necessary to reconsider it "in the interest of sound elaboration of constitutional doctrine." Id. at 2505 (Kennedy, J., concurring). These statements have made the Board, which continues at an indisputably enormous expense to use alternate methods of delivering Chapter 1 instruction to parochial school students, eager for an opportunity to get rid of the Aguilar decision.

This motion has been brought for that purpose. The Board has moved pursuant to Rule 60(b) of the Federal

Rules of Civil Procedure for relief from the injunction entered by Judge Neaher. Defendant-Intervenors, who are parents of eligible children who attend nonpublic schools, have joined in the motion. Although both the Board and the Defendant-Intervenors suggest in their arguments that this Court can properly pronounce Aguilar dead and afford them relief from the injunction, at bottom all they seek is a procedurally sound vehicle to get the issue back before the Supreme Court.[3] The defendant Secretary of the U.S. Department of Education, who has supported the Board throughout this litigation, has observed that I cannot grant the motion because the Supreme Court has spoken in this very case, and its decision is not only binding precedent, it is also law of the case. Although the language of its

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[3] See, e.g., Reply Memorandum of Law in Support of Defendant Chancellor's Motion for Relief From Judgment at 4 ("Defendant would be delighted to go directly to the United States Supreme Court. This course, however, is not available.")

submission is somewhat elliptical, the Secretary also appears to want an order that will eventually allow all of the defendants to seek reconsideration by the Supreme Court of its prior decision in the case.[4]

Insofar as it is relevant to this motion, Rule 60(b) of the Federal Rules of Civil Procedure provides as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . (3) fraud . . .; (4) the judgment is void; (5) the judgment has been reversed or otherwise

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[4] Specifically, the Secretary states that although the motion cannot be granted, "we should not be understood to suggest that a reconsideration of [Aguilar] would be inappropriate in the Supreme Court . . . . [W]e preserve our right to support a request by the Chancellor that the Supreme Court reconsider its ruling in this case." Federal Defendant's Response to Chancellor's Motion for Relief From Judgment at 6.

> vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reason (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. ...

The Board and the Defendant-Intervenors seek relief from Judge Neaher's injunction pursuant to clause 5. Relying on Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992), they contend that a party seeking prospective relief from an injunction may meet its initial burden by showing either a significant change in the factual conditions or in the law. They contend that the criticisms of Aguilar by five Supreme Court justices in the Kirvas Joel case not only portend a significant change in the law, but actually constitute one.

Rule 60(b) (5) may properly be invoked to afford relief from an injunction when a change in the decisional

law makes it no longer equitable to enforce it. New York State Ass'n For Retarded Children v. Carey, 706 F.2d 956, 967 (2d Cir.), cert. denied, 464 U.S. 915 (1983); see generally 11 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, ¶2863 (1995). The Court in Rufo held that "modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent." 112 S.Ct. at 762. The principle applies to injunctions, and the Supreme Court has observed that "there are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction." System Federation No. 91, Railway Employees' Department, AFL-CIO v. Wright, 364 U.S. 642, 650 n.6 (1961).

I am mindful of the competing interest at issue here: the finality of judgments. Rule 60(b) may not be used as a substitute for appeal. However, it is plain that

the Board's motion does not offend that rule. Indeed, there could have been no further appeal from the adverse decision by the Supreme Court in 1985. Moreover, it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now.[5] Finally, the heart of the Aguilar result was the injunctive relief that restricts the Board's use of Chapter 1 funds now and into the future. In these circumstances, allowing the defendants to resuscitate pursuant to Rule 60(b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done. See C. Wright, et al., supra, § 2851 at 227.

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[5] As noted below, it is possible to make too much of the Aguilar-bashing mentioned above. The various comments about the decision in Kirvas Joel were made (or joined in) without the benefit of briefing and oral argument, and three of the five Justices involved were not on the Court when it decided Aguilar.

Although plaintiffs have not explicitly relied on the law of the case doctrine in their effort to convince the Court not to "entertain" the motion, the doctrine deserves brief mention in this unusual procedural setting. It generally prevents a district court from deviating from a mandate from above. "However, the doctrine is limited by discretion and should be discarded for a 'compelling reason' such as 'an intervening change of law, significant new evidence, or the need to correct a clear error of law or manifest injustice.'" Whimsicality, Inc. v. Rubie's Costume Co., 836 F.Supp. 112, 116 (E.D.N.Y. 1993) (quoting United States v. Salerno, 932 F.2d 117, 121 (2d Cir. 1991)). Thus, if the Board were able to satisfy its burden of demonstrating a sea change in the law since Aguilar sufficient to warrant relief under Rule 60(b), the law of the case doctrine would not preclude such relief.

Finally, plaintiffs' assertion that the motion is untimely is without merit. Under the rule, the motion must be made "within a reasonable time." Whether that has occurred depends on the facts of the case, the reason given for the delay, and whether the plaintiffs are prejudiced by the delay. Emergency Beacon Corp. v. Barr, 666 F.2d 754, 760 (2d Cir. 1981); see generally C. Wright, et al., supra, § 2866. Although the grist for the motion also includes the general development of the Establishment Clause cases since Aguilar, the Board relies most heavily on the opinions in Kirvas Joel, which was decided on June 27, 1994. By resolution passed on June 7, 1995, the Board committed to seeking an overruling of Aguilar. Counsel for the Board has stated that, in light of the need to digest and discuss the issue, and its the [sic] obvious political sensitivity, the Board acted as expeditiously as could reasonably be expected. Plaintiffs have not contested those

representations, and in any event I accept them as a reasonable explanation for the delay in filing the motion, which occurred within a reasonable time after the Board's resolution.

Furthermore, there is no cognizable prejudice to plaintiffs as a result of the delay. True, they may lose what they obtained in 1985 if this case makes it back to the Supreme Court, but they have not suggested that they have been handicapped in litigating the issue by the passage of time.

In sum, I conclude that the Board has properly proceeded under Rule 60(b) to seek relief from the injunction. In a proper case, the rule is available for such relief when the intervening decisional law renders inequitable the continued enforcement of an injunction. Indeed, as a procedural device, it is far preferable to contemptuously defying the injunction by placing teachers

back in the parochial schools, the course that, according to counsel for plaintiffs at oral argument, is the only proper means of obtaining appellate review of the continuing validity of the injunction. Even assuming such a contempt citation would in fact permit review of the underlying merits of the Aguilar decision, I see no reason for reading Rule 60(b) to require such a result, and plaintiffs have provided none. Finally, under all the circumstances, the motion has been filed within reasonable time.

Having concluded that the motion is procedurally firm, I deny it on the merits. There may be good reason to conclude that Aguilar's demise is imminent, but it has not yet occurred. More importantly, it is not so certain an event that this Court could properly anticipate it by affording the relief sought here. However, [it] does seem clear to me that the Board should be permitted to seek the reconsideration of Aguilar that a majority of the Supreme

court appears willing, if not anxious, to undertake. In addition, there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision.

The motion is denied.

So Ordered.

JOHN GLEESON
UNITED STATES DISTRICT JUDGE

Dated: Brooklyn, New York
May 20, 1996

JUDGMENT DATED SEPTEMBER 26, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

-and-

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Intervenor-Defendants.

JUDGMENT

A memorandum order of the Honorable Edward R. Neaher, United States District Judge, Eastern District of

New York, having been filed on October 11, 1983, granting defendants' motion for summary judgment, denying plaintiffs' motion for summary judgment and directing the Clerk of Court to enter judgment in favor of defendants dismissing the complaint, and the Clerk of Court having entered the judgment on October 20, 1983, and

An order of the United States Court of Appeals for the Second Circuit having been filed on July 9, 1984, reversing the order of the District Court and directing the District Court to enter judgment granting plaintiffs' cross-motion for a judgment declaring that New York City's plan under Title 1 of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, et seq., violates the Establishment Clause, and an appropriate injunction, and directing that the District court should afford sufficient time for the City to propose and the Secretary to approve an alternative plan, and staying the issuance of a mandate until

thirty days after the final disposition of any timely petition for rehearing or suggestion for rehearing en banc, in order to enable defendants, if they remain aggrieved, to petition the Supreme Court for certiorari (or, if they should consider this appropriate, to appeal under 28 U.S.C. § 1252), and, if such a petition be filed and/or such an appeal be taken, until the final disposition thereof, and

A judgment of the Supreme Court of the United States having been filed on July 31, 1985, affirming the judgment of the Court of Appeals, and the mandate of the Supreme court having issued to the Court of Appeals on the same date, and

The mandate of the Court of Appeals having been filed in the District Court on August 26, 1985, it is

ORDERED and ADJUDGED that New York City's plan under Title 1 of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, et seq., as

superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801, et seq., violates the Establishment Clause of the First Amendment on entanglement grounds to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools, and it is further,

ORDERED and ADJUDGED that the defendants, the Secretary, United States Department of Education, and the Chancellor of the Board of Education of the City of New York, are permanently enjoined from using public funds for any plan or program under Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801, et seq., to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on

the premises of sectarian schools within New York City, and it is further,

ORDER and ADJUDGED, that in accordance with the opinion of the Court of Appeals, which was affirmed by the Supreme Court, this judgment shall be stayed until the start of the September 1986 school year, on condition that the Chancellor of the Board of Education of the City of New York shall, commencing December 2, 1985, and each 60 days thereafter, submit a written report to the Court and to counsel for the plaintiffs describing in reasonable detail the progress being made to conform the City's Title 1 plan to the requirements of this judgment.

_____

U. S. D. J.

Dated: Brooklyn, New York
September 26, 1985

DECLARATION OF MARGARET O. WEISS SUBMITTED IN SUPPORT OF PETITIONERS' RULE 60(B) MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

-and-

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Intervenor-Defendants.

DECLARATION

MARGARET O. WEISS, declares, pursuant to 28 U.S.C. § 1746, under penalty of perjury under the laws of the United States of America, that the following is true and correct:

1. I am the Director of the Bureau of Nonpublic School Reimbursable Services of the Board of Education of the City School District of the City of New York. I am responsible for implementing various federal programs which provide instructional and support services to students who attend private schools within New York City. One of these federal programs is Chapter 1 of Title 1 of the federal Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § § 2701, et seq. ("Chapter 1").

2. I have been an educator for over 31 years and have worked in remedial education, as a teacher, supervisor and administrator, for over 27 years. I have worked for the Board of Education of the City School

District of the City of New York ("the Board" or "the Board of Education") since 1965.

3. I have worked for the Bureau of Nonpublic Reimbursable Service ("the Bureau") since 1972. In that year, I became a field supervisor for corrective reading for the Chapter 1 (then called Title 1) program, and in 1974 I became the coordinator of the Chapter 1 Reading Skills Center program, which serves severely disabled readers. As coordinator, I was responsible for training and supervising the teaching and administrative staff of the program, developing courses of instruction for over 400 children and implementing the program. In 1979, I became Assistant Director of the Bureau, and in 1985, I became Director of the Bureau.

4. I hold a Masters of Science in Education and have completed an additional 30 graduate credits in School Supervision and Administration. I hold two professional

teaching licenses and two professional certifications in school administration from the New York State Education Department. I also hold one teaching license and three licenses in education administration from the Board of Education.

5. I submit this declaration in support of the motion of defendant Chancellor of the City School District of the City of New York (denominated in the caption as the Chancellor of the Board of Education of the City of New York), which seeks relief from this Court's judgment, dated September 26, 1985, aff'd., 787 F.2d 35 (2d Cir. 1986), which permanently enjoined the Chancellor "from using public funds for any plan or program under [Chapter 1] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools

within New York City ...." (Slip opinion, at 2. A copy of the judgment is annexed as Exhibit "1.")

6. By resolution dated June 7, 1995 the Board of Education of the City School District of the City of New york (hereinafter "the Board of Education"), authorized the commencement of legal proceedings seeking relief from the judgment. The Board of Education concluded that these proceedings should be commenced because of the adverse effects of the judgment, and the clear indication, based on the opinions of several Justices of the United States Supreme Court, that the judgment no longer reflects current law. In pertinent part, the resolution authorizes that relief be sought from the judgment:

> ...in light of the significant costs associated with the alternative service delivery methods now used which divert scarce funds from the provision of remedial services to both public and nonpublic school students, the educational superiority of on-premise services, and the opinion of several United

States Supreme Court Justices that Aguilar v. Felton should be revisited...

(A copy of the resolution is annexed as Exhibit "2.")

Brief Overview of the Chapter 1 Program

7. Chapter 1 was first enacted in 1965. The statute provides federal funds for remedial; supplementary education and support services for elementary and secondary school students. To be eligible, a student must have below grade level educational achievement in reading and/or mathematics and reside within the attendance boundaries of a participating public school located in a low income area. (20 U.S.C. § § 2721(a), 2723(a); 34 C.F.R. § 200.6(c).)

8. The statute has always provided that both public school and private school students are eligible for Chapter 1 services. Implementing regulations promulgated by the United State Department of Education required that private school students receive services that are

"comparable" to those provided to public school students. More recent statutory enactments and regulations continue that requirement by mandating that there be "equitable" participation of eligible students in the Chapter 1 program, without regard to whether they attend public or private schools. (20 U.S.C. § 2727(a), (b)(2); 34 C.F.R. § § 76.654(a), 200.50(a)(1), 200.71(b).) (Effective July 1, 1995, pursuant to the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat.l 3517, the name of the program will change from "Chapter 1 of Title I" to simply "Title I." However, in this declaration, the program is referred to as Chapter 1, and the cited statutory provisions are those in effect prior to July 1, 1995, since this motion primarily concerns a time period prior to July 1, 1995.)

9. Pursuant to the statute, Chapter 1 services are normally implemented by a local educational agency

("LEA"), under the supervision of a state educational agency ("SEA"). (20 U.S.C. § 2722(b).) The Board of Education is the LEA for the City of New York.

10. It should be noted that the City of New York is also subdivided into thirty-two community school districts, each of which has a community school board. A variety of functions are delegated to the community school boards by the Board of Education. (New York Education Law §§ 2564, 1590, et seq.) A few of the community school districts administer a portion of the Chapter 1 funds that are allocated to serve the private school students in their districts. However, the Chancellor, through my Bureau, administers the vast majority of the Chapter 1 funds that are allocated to private school students in New York City. Accordingly, except as otherwise noted, the numbers and other details provided herein refer to the

Chapter 1 services for private school students administered by the Chancellor.

11. The Board of Education is the largest LEA in the nation, and our Chapter 1 program is the largest in the nation. In school year 1993-94 (the most recent year for which complete statistics are available), the program served 259,097 students. Of these, 237,200 students attended public school and 21,897 students attended private school.

12. The basic educational composition of Chapter 1 services for private school students, as provided by the Board of Education, has remained essentially unchanged, from Chapter 1's inception in 1965 until today. Only secular, remedial instruction is provided. Instruction is given in three basic areas -- reading, mathematics and English as a Second Language.

13. In addition, the program provides clinical and guidance support services for eligible children who have emotional or family problems which interfere with their academic performance. The clinical services are provided by social workers and psychologists, and the guidance services by guidance counselors.

14. The Board provides Chapter 1 services only to eligible students who attend private schools; it does not provide services to the private schools, nor to the general student populations of these schools.

15. These same basic services have been provided over the three decades that the Chapter 1 program has been in existence. These services have always been designed to supplement, and not supplant, the students' regular classroom instruction. What has changed, as a result of this litigation, have been the methods by which the services have been delivered to students who attend private

religious schools. This case reached the United States Supreme Court, which held, in Aguilar v. Felton, 473 U.S. 402 (1985) ("Aguilar"), that the Board's provision of Chapter 1 services by publicly employed teachers and other professional employees inside religious schools violated the Establishment Clause. This Court's September 26, 1985 judgment, enjoining this method of providing Chapter 1 services, followed.

Chapter 1 Services for Private Schoolchildren Before the Judgment

16. When the Chapter 1 program began, in 1965, the Board of Education provided services to private school students after the students' regular school day was completed. However, it was quickly concluded that these after school services for private school students were not as effective as, and therefore not comparable to, the Chapter 1 services for public school students, which were provided during the regular school day. Both the students and

teachers were tired. In addition, parents had serious concerns about the younger children having to get home in the dark during the winter months, and older children had scheduling conflicts created by jobs and other activities.

17. The Board of Education consulted with other LEAs around the country, and learned that they were experiencing similar difficulties with after school Chapter 1 programs. Indeed, one district court subsequently found that an after school Chapter 1 program for private school students was not comparable to the regular school day program for public school students. Based on our own experience, and the reported experience of other school districts, the Board of Education concluded that Chapter 1 services for private schoolchildren should be provided during the regular school day, to ensure that they would be comparable to the Chapter 1 services for public schoolchildren.

18. Accordingly, after the first year of the program, the Board provided Chapter 1 services to all private schoolchildren during the course of their regular school day, by sending its teachers, guidance counselors, and other professional and instructional employees into classrooms in the private schools (including the religious schools). These classrooms were designated as Board of Education Chapter 1 rooms and in most instances were used exclusively for the Chapter 1 program.

19. As is clear from the record in this case, the method of providing Chapter 1 services to religious school students prior to the judgment, in-school services during the regular school day, was highly successful from an educational standpoint. Annual reports by independent evaluators found that private school students who participated in the program showed measurable improvement in overcoming their educational achievement

deficits. The program was also far less expensive to operate than an off-premises program. (For a complete description of the prejudgment program, the Court is referred to the Joint Appendix which was submitted to the United States Supreme Court, a copy of which is annexed as Exhibit "3")

20. The Board's program was not atypical; beginning in 1965 or soon hereafter, throughout New York State, and upon information and belief, throughout the nation, Chapter 1 services for children attending religious schools were largely provided inside the religious schools by publicly employed teachers and other professionals. (Letter dated July 12, 1985 from Gordon Ambach, Commissioner of the New York State Education Department, to William Bennett, Secretary of the United States Department of Education, annexed hereto as Exhibit "4")

Alternative Service Delivery Methods After this Court' s 1985 Judgment

21. During the 1984-85 school year, the Board provided Chapter 1 services to 172,263 public school students and 21,958 private school students, for a total of 194,221 students. All but 52 of the participating private school students attended religious schools, and were therefore affected by this Court' s judgment. This meant that new methods of delivering Chapter 1 services had to be devised for these nearly 22,000 private schoolchildren, who attended 252 private religious schools. (As used hereafter in this declaration, the term "private school" refers to those schools whose students' receipt of Chapter 1 services is affected by this Court' s judgment following the Aguilar decision.)

22. In August 1985, the United States Department of Education issued a written Guidance on Aguilar v. Felt on and Chapter 1 (a copy of the Guidance

is annexed hereto as Exhibit "5.") In question and answer number 4, the federal government stated that an LEA's Chapter 1 application could not be approved, and Chapter 1 finds could not be expended, unless the LEA' s Chapter 1 program provided for equitable services to private school children Thus, the Board was legitimately concerned that if its post-Aguilar Chapter 1 services for private schoolchildren were not equitable, its entire Chapter 1 program, for both public and private schoolchildren, would be jeopardized.

23. On September 26, 1985, this Court issued its judgment permanently enjoining the provision of Chapter 1 services by public school teachers and guidance counselors on the premises of sectarian schools. The judgment included a stay until the beginning of the 1986-87 school year, to give the Board an opportunity to develop alternative means of delivering Chapter 1 services to the

students who attended these sectarian schools. (Exhibit "1," annexed.)

24. By memorandum dated July 22, 1985, the New York State Department of Education identified four possible alternatives for the delivery of Chapter 1 services to private schoolchildren. These four suggested alternatives were: 1) in public schools; 2) in neutral sites; 3) in mobile or portable vans equipped as classrooms and 4) through instructional technology (Memorandum dated July 22, 1985 from Robert D Stone, General Counsel of the New York State Department of Education to District Superintendents, etc., annexed hereto as Exhibit "6").

25. These four suggested alternatives are the four delivery methods which the Board has used to comply with this Court's judgment following Aguilar ("post-Aguilar delivery methods"). For purposes of this declaration, the four methods are referred to as: (1) "public

school sites"; (2) "MIUs," which are mobile instructional units; (3) "leased sites," which are sites leased by the Board of Education from private entities and (4) "CAI," which is "computer-assisted instruction."

26. The Board has used public school sites, leased sites and MIUs since the 1986-87 school year, when post-Aguilar delivery methods were first implemented. The Board began using CAI in the 1987-88 school year.

27. As discussed further below, providing Chapter 1 services to students inside their own schools is preferable to using the post-Aguilar delivery methods. Judge Friendly had noted that alternatives to in-school services "are almost certain to be less effective, more costly, or both." Felton v. Secretary, U.S. Dep't. of Educ., 739 F.2d 48, 71 (2d Cir. 1984). Judge Friendly's prediction was accurate; the alternatives have been less effective and more costly than in-school services.

Public School Sites

28. A public school site is a room or rooms in a public school that are used to provide Chapter 1 services for private schoolchildren. The rooms may be located anywhere in the building. Obtaining public school sites for use during the regular school day is difficult, because of the lack of excess space in many public schools, and the educational and logistical problems created by transporting children to and from a public school site. In 1985-86, school overcrowding was so severe in some neighborhoods, that certain public schools were busing their own students to different schools for the entire school day. As discussed further below, the space shortage in public schools has become far worse since 1986.

29. The use of public school sites also creates a loss of instructional time, which is a serious concern for Chapter 1 students. The Board therefore sought to

minimize travel time, and established a maximum one way vehicular travel time between the two schools of ten minutes. The necessary limitation on travel time further restricts the availability of appropriate public school sites. Insofar as an alternative site is closer to the private school than is the public school site, it is educationally preferable to use the alternative site.

30. To minimize the loss of instructional time, most private school students are transported between the private school and the Chapter 1 public school site by mini-vans or buses. These vehicles are owned and operated by private companies which are under contract to the Board to transport students between their homes and schools at the beginning and end of the school day, and are thus available for Chapter 1 purposes from approximately 9 a.m. to 2:30 p.m. Private school students who attend a

public school site which is within one block of their own school normally walk.

31. For the 1986-87 school year, the Board was able to offer Chapter 1 services at public school sites to students attending 194 private schools; however the offer was only accepted by students from 52 private schools. The result was a dramatic decrease in the number of private school students receiving Chapter 1 services. In school year 1986-87, the first year in which the post-Aguilar program was implemented, the overall number of participating private school students decreased by approximately 50% from the number participating in the prior school year

32. Objections to the public school sites, as expressed by many private school principals, included: the loss of instructional time caused by travel (it was noted that the travel time computed by the Board was just for travel

between the two schools, and that additional time was lost in walking to and from classrooms, particularly those on upper floors); drug dealing and other criminal activities near the private school, the public school or both; heavy traffic and high accident rates on the proposed route between the two schools; and the reluctance or unwillingness of many parents to have their children leave their school building or travel during the school day. Some private school principals indicated that their students would attend public schools which were closer to the private school than the public school site offered; however there was no available space in those pubic schools.

33. Since the post-Aguilar delivery methods were instituted, there has been a continuing decline in the number of public school sites which have been utilized in the Chapter 1 program. In school year 1986-87, 3,578 students attending 52 private schools received their Chapter

1 services at 49 public school sites. During 1993-1994, 1,219 students from 16 private schools received services at 15 public school sites (either exclusively or as part of a combination program, as discussed below).

34. Most of the decrease in public school utilization is due to increased overcrowding in the public schools Of the 34 public school sites which were dropped between 1987 and 1994, 23 were lost because the public school needed the classroom space for its own students' regular educational program.

35. On October 31, 1986, the student enrollment in New York City' s public schools was 940,208. On October 31, 1994, the student enrollment was 1,034,235. This is an increase of 10%, in just 8 years.

36. As is fully described in a January 1995 report by the Comptroller of the City of New York, Overcrowding in New York City Public Schools: Where

Do We Go from Here? (a copy is annexed hereto as Exhibit "7"), public school overcrowding became particularly severe starting in the late 1980' s. The major cause has been a rapid increase in enrollment growth since 1989. In addition, in 1988, the Board significantly reduced class size, which further increased overcrowding. The rate of increased enrollment is now 21,000 students per year, due primarily to immigration and the high number of births. The current growth rate is expected to continue into the next century. (Exhibit "7," pp. ES1, 1, 3 (figure 2).)

37. As the Comptroller' s Report indicates, the school system is now so crowded that 90,000 students, which is 9% of the public school population, lack regular classroom seats. Since the construction of new school buildings is too costly and too slow a process to address the great and growing space need, other solutions,. some drastic, are being explored. These include double shifts

(students attend school on different shifts), a year-round school calendar and large-scale busing of students to other, underutilized schools. (Exhibit "7." pp. ES1, 30-50).

38. For purposes of the Chapter 1 program, the overcrowding situation is even worse than the overall figures suggest, since a majority of the Chapter 1 private school students attend school in areas where the public schools are most overcrowded. In the 1993-94 school year, 59% of the private school Chapter 1 students attended schools which were located in the 15 most overcrowded community school district. As explained in the Comptroller' s Report, increased immigration is the major cause of the increase in enrollment, and immigrants frequently congregate in particular neighborhoods. As a result, the overcrowding is far more severe in these neighborhoods. (Exhibit "7," pp. 4-8, 12-22). Since eligibility for Chapter 1 includes a requirement that the

student reside within the attendance boundaries of a participating public school in a low-income area, the Chapter 1 programs are often concentrated in areas where large numbers of immigrants reside and the public schools are most crowded

Mobile Instructional Units ("MIUs")

39. As discussed above, when the Board first created its post-Aguilar delivery methods for the 1986-87 school year, there were many more public school sites available than in subsequent years. However, even in 1986, no appropriate public school sites could be found for the Chapter 1 students of 48 private schools.

40. Accordingly, mobile instructional units were obtained for these eligible private school students. Based on the number of Chapter 1 students in these private schools, and the types of services provided to these students, it was determined that 70 MIUs would be required.

41. The MIUs are large vehicles equipped as classrooms. They have been specially designed to comply with the stringent New York City health and safety code requirements for space occupied for the instruction of children.

42. The MIUs have also been specially designed to meet the needs of the Chapter 1 program. Under New York State Department of Education guidelines, which apply to both public and private school students, the maximum size for a Chapter 1 class with one teacher is 10 students. However, space is also required for students' sessions with guidance counselors, social workers or school psychologists, and for conferences between Chapter I staff and private school staff or private school parents.

43. The MIUs are expensive, and the Board accordingly sought to maximize the use of each MIU, and thereby minimize the number of MIUs and their total cost.

The interior of each MIU contains a folding partition; when the partition is closed, the larger section can accommodate a class of 10 students and a teacher, and the smaller section, which seats 3 or 4 students, can simultaneously accommodate either a small English as a Second Language class, or a guidance session, or a parent-teacher conference, etc.

44. The Board had no facility in which a large number of vans could be garaged, stored, cleaned, repaired and maintained. Other school systems had found such facilities very expensive to build and operate, and in their experience, vandalism and insurance coverage were also expensive. Accordingly, the MIU contract requires that the supplier also provide garage, maintenance, repair, cleaning, security and insurance.

45. The contract further requires the supplier to build and maintain spare vehicles, which can be used as

replacements when necessary, to avoid disruptions in service. Finally, the contract requires that the supplier provide a driver for each MIU, who not only drives the MIU between the garage and the private school, but remains in the MIU or the area surrounding the MIU during the school day to provide security. Security is a serious concern in regard to the MIUs, since they are parked in the open on public streets, usually in high-crime areas. There have been incidents, including one shooting, which occurred right outside an MIU.

46. Three photographs, showing the exterior and the interior of MIUs leased from Ferdinand Arrigoni, Inc. (d/b/a New York Bus Service) are annexed hereto as Exhibit "8." The serious security concerns associated with the MIUs are reflected in the design of these vehicles. As the photographs show, the windows in the classroom areas

are all relatively high and small, and the windows are covered with a heavy wire grid.

47. Each MIU bears the words "New York Bus Service" on all four sides in large, contrasting lettering, and bears a large decal of the Board of Education seal on two sides (see photographs at Exhibit "8.") The MIUs do not obtain electricity from the private schools; each MIU carries a generator which supplies all electrical power. There are no telephones in the MIUs. Each MIU is equipped with a walkie-talkie, which is used by the driver for emergency communication with the private school.

48. There is limited storage space on the MIUs for equipment, material and supplies. However, since the space is not unlimited, the Chapter 1 teacher usually stores surplus supplies and materials in the private school. The teacher replenishes supplies from the surplus stock

approximately once a month or less frequently. There are no bathrooms or lunchrooms on the MIUs.

49. When in service, the MIUs are parked on a public street near the private school whose students are receiving services; the MIUs are never parked on private school property. The MIUs are generally parked either on the same block as, or around a corner from, an entrance to each private school. When not in use for Chapter 1 purposes, the MIUs are garaged in a facility owned or leased by the supplier.

50. The only instruction provided in MIUs is secular Chapter 1 instruction. They are not used for instruction in religious subjects, nor for the private schools' educational programs.

51. The Board designed specifications to meet the applicable code requirements and educational needs, and then solicited competitive bid proposals from private

contractors for the leasing of MIUs. During the first three school years of our post-Aguilar program, the Board of Education leased 70 MIUs. The Board then entered into an agreement to lease an additional 58 Mrs., which were delivered over the next two school years. By the end of 1990-91, delivery was complete and the Board was leasing 128 MIUs. No additional MIUs have been leased; indeed, in the 1994-95 school year, the number of MIUs was reduced to 126.

52. The number of students receiving services in MIUs (either exclusively or as part of a combination program, as discussed below), has increased over the years. In 1986-87, 5,503 students from 72 private schools received services in MIUs; in 1993-94, ~ 1,622 students from 141 private schools received services in MIUs.

Leased Sites

53. A leased site is a building or part of a building that the Board leases and uses to provide Chapter 1 services to private school students. From the time of the Aguilar decision to the beginning of the 1986-87 school year, the Board made inquiries concerning nearly 500 potential leased sites. Approximately 475 of the original 500 Potential leased sites were rejected for one or more reasons: they were not religiously neutral; they had no space available for Chapter 1 purposes; the landlord was unwilling to rent the site to the Board; they were unsuitable for classroom instruction or they would have required extensive, lengthy, and costly renovations. Of the original 500 potential leased sites, 190 were owned by religious organizations. The Board rejected 141 of these 190 sites because they were not religiously neutral.

54. The Board approves leased sites without regard to the religious affiliation, if any, of the owner.

Most but not all of the leased sites used for Chapter 1 services are owned by religiously-affiliated organizations. However, neither the interiors nor the exteriors of the buildings where the leased sites are located bear any visible religious symbols. If such symbols are present, they are either removed or covered. The leased sites are identified as Board of Education facilities, by signs that read: "New York City / Board of Education / Chapter 1 Facility".

55. Further, the only activity which occurs at each leased site is secular Chapter 1 instruction. The leases for these sites provide that, for the duration of the lease, the Board of Education has exclusive use and occupancy of the site and no religious activity or instruction may occur anywhere in the building where the site is located.

56. Each of the Board's leased sites is in a building that is separate from the private school building(s) whose students are served at the sites. Near the beginning

of the 1986-87 school year, the Board leased thirteen sites to provide Chapter 1 services to private school students.

57. Of these thirteen leased sites, twelve were closer to at least one of the private schools whose students they served than was the nearest public school with available space (and the thirteenth site was approximately the same distance) Thus, the use of these leased sites reduced the travel time and increased the regular classroom instructional time for the students.

58. In 1986-87, 1,580 students from 17 private schools received Chapter 1 services in leased sites. Commencing in January 1987, the annual rental for these thirteen sites was $4.75 per square foot, which was at the low end of the range of the Board' s usual cost for similar leased space.

59. The use of leased sites has continued in similar fashion. In the 1993-94 school year, 1,601 students

from 14 private schools received Chapter 1 services in eleven leased sites (either exclusively or as part of a combination program, as discussed below).

Computer-Assisted Instruction

60. In computer-assisted instruction ("CAI"), private school students receive Chapter 1 instruction through computers that are linked by modem or by dedicated telephone lines to a Board of Education office. The Board began using CAI to serve private school students in the 1987-88 school year.

61. CAI utilizes both desk-top computers that are installed in the private schools, usually in dedicated rooms used exclusively for CAI (referred to as "CAI rooms"), and lap-top computers that are distributed to private school students for use at home.

62. Chapter 1 teachers are not present in the private school during CAI use. When students use the

computers installed in the private schools, data recording their work is transmitted electronically to a Board of Education office, where Chapter 1 teachers monitor the students' work, print and review reports of their progress, and adjust each student' s curriculum as appropriate.

63. The only Board of Education employee who is present in the CAI room while the private school students work on the computers is a non-instructional technician (referred to as a "CAI technician"). These technicians are non-professional employees The CAI technician' s primary duty is to maintain order among the students They also take attendance, maintain student records and perform elementary functions with the computers, specifically turning them on and off, rebooting them and bringing up the program, if necessary.

64. There are many electronic and physical safeguards to insure that the CAI computers are not usable

for any purpose other than Chapter 1 instruction Some of the computers are "dumb" terminals that do not have their own central processing units or disk drives. These "dumb" terminals automatically connect themselves to the main computer located at a Board of Education site when they are turned on; the main computer transmits the Chapter 1 lessons electronically to the terminals in the private schools.

65. The remainder of the CAI computers installed in the private schools are personal computers that have their own central processing units and floppy disk drives The floppy disk drives are covered by locked security devices. The Board of Education has sole possession of the keys to the security devices.

66. Not only is the software used in these CAI computers limited to that installed by the Board or at its direction, but the Board also electronically limits access to

these computers to students enrolled in the Chapter 1 program. The Board prohibits students who are not registered for CAI from using the **Chapter 1** computers. Private school staff are also prohibited from using the CAI computers at any time.

67. The Board gives each student enrolled in CAI a password. To access a CAI computer, a student must enter his or her password, which automatically places the student in the program designated for him or her by a Chapter 1 teacher. The computers located in the private schools cannot be activated or used in any other way, except to print a student progress report pursuant to an electronic command.

68. All but a few of the computers installed in the private schools are located in separate rooms, in which no other activity occurs while Chapter 1 CAI is given ("CAI rooms"). The only persons who may be present in

the CAI rooms during CAI sessions are the students and the Board' s CAI technician. Religious symbols in the CAI rooms are prohibited.

69. Almost all CAI rooms are used only for Chapter 1 instruction. In three schools in which CAI sessions are held only two or three times a week, the CAI rooms are used for other purposes on the days when there are no CAI sessions.

70. In a few private schools, the small number of Chapter 1 eligible students warranted the installation of only one computer. Beginning in April 1989, one CAI computer (each a "dumb" terminal type) was installed in some of these schools in a room that the schools may use for other purposes (such as a supply room) at any time. Through the end of school year 1990-91, this arrangement has been used in a total of four private schools. None of those four schools continue to use this arrangement;

however, this arrangement has been implemented in two other private schools since 1991.

71. In addition to the CAI computers that are installed in private schools, the Board of Education has acquired and distributed "lap-top" computers for use in the homes of some Chapter 1-eligible private school students. These lap-tops have been electronically "encrypted" so that they are only usable for Chapter 1 instruction.

72. Each lap-top is a PC that has only a floppy disk drive (no hard disk drive). The PC hardware (i.e., "mother board") has been altered so that the disk drive can read only the floppy disks that the Board provides with the computers. These floppy disks are dialing disks; their only capability is to automatically dial a local area network when the computer is turned on, through an internal modem which connects the lap-top to the software company. The Chapter 1 instructional programs are then

transmitted to the lap-top. The Chapter 1 teacher at the Board of Education office can electronically monitor the student' s work and adjust the lessons appropriately. The process is similar to that used with the CAI computers installed in the private schools.

73. The Board selects all the software which is used in CAI. No software is used which could be diverted for religious purposes, or for any secular purpose other than CAI. For example, to ensure non-divertibility, the Board does not use word processing, graphic or spreadsheet software in CAI.

74. CAI was first used in school year 1987-88, when 2,135 students from 22 private schools were served by CAI. The use of CAI has increased over the years; in 1993-94, 9,662 students from 149 private schools used CAI.

75. From an educational perspective, as the Chapter 1 achievement tests demonstrate, it is preferable for students to have face-to-face interaction with teachers, rather than to work only on computers. Therefore, the Board implemented combination services, in which private school students who receive CAI also receive some face-to-face instruction from Chapter 1 teachers in public school sites, Migs, or leased sites.

76. In this combination program, CAI is generally used two days per week and face-to-face instruction one day per week The Board has been able to provide combination services to only a small portion of the students who receive CAI, because of the limited availability of public school sites, leased sites and MIUs, and because face-to-face services were declined in some instances because private school students did not want to leave their school building.

77. Combination services were offered beginning in school year 1988-89 The number of students who received combination services are a subset of the number of students who received CAI. In school year 1988-89, 1,003 students from 25 private schools received Chapter 1 combination services. In subsequent school years, the use of combination services has increased; in 1993-914, 2,115 students from 63 private schools received combination services.

Problems Created by Compliance with the Judgment

78. Compliance with this Court' s judgment has created a system for provision of Chapter 1 services to private school students that is more expensive, less educationally effective and less administratively efficient than the in-school delivery of Chapter 1 services which was used for private school students prior to the judgment. In-school delivery of Chapter 1 services is in all ways

preferable, and continues to be used for all public school students throughout New York City.

79. Of greatest concern, from an educational perspective, is the time spent by students in moving between their regular classroom and their Chapter 1 site. This is time lost from their regular classroom instruction and is an especially serious concern for Chapter 1 students, since they are the students who are most in need of instruction. The public school site and leased site alternatives often entail significant travel time.

80. Additional instructional time loss and disruption is caused for both the Chapter 1 students and their regular school classmates because Chapter 1 students have to leave their school buildings to receive services at the public school sites, leased sites and MIUs, and therefore have to put on and remove outer garments. This is not a trivial disruption, since most of the Chapter 1

private school students are in the elementary school grades, and this task is often a major undertaking for young children in the winter.

81. Another consideration is safety. Most of the private schools are located in low income neighborhoods, as are most of the alternative Chapter 1 sites. Many of these neighborhoods have high rates of violent crime. An MIU parked on the street in a high-crime area is more exposed and not as secure as a school building. Walking or even driving children through high-crime areas raises safety considerations. In fact, since the post-Aguilar delivery methods were instituted, a few incidents have occurred which were upsetting to the students, but fortunately resulted in no harm There was a sniper outside one school when the students were scheduled to be leaving, gangs have threatened some students, and drug dealing has occurred in the vicinity of students. The Board has considered the

levels of violence and crime in particular neighborhoods in determining the appropriate method of service delivery for students of a particular school.

82. The CAI alternative avoids the instructional time loss, disruption and safety concerns created by the other post-Aguilar delivery methods. However, while CAI has educational value, it is not as educationally effective as direct face-to-face interaction between student and teacher. Although as a group, the Chapter 1 private school students who receive only CAI instruction do meet the New York State Department of Education' s educational gain standards for the Chapter 1 program, they do not perform as well, overall, as the students who receive face-to-face instruction.

83. Further, for Chapter 1 instruction to effectively supplement the students' regular instruction in reading, mathematics or English as a Second Language,

there must be coordination between the regular and Chapter 1 curricula, so that Chapter 1 instruction can supplement and reinforce the regular classroom instruction.

84. For this reason, the Chapter 1 statute and regulations and New York State Education Department guidelines mandate that the LEA's Chapter 1 program include effective strategies to coordinate the Chapter 1 curriculum with the students' regular educational programs, regardless of whether the students attend public or private school, and mandate consultation between Board of Education and private school officials to develop Chapter 1 services that effectively supplement the students' regular classroom instruction. (20 U.S.C. 2722(c)(3), 2727(a), 34 C.F.R. 200.51(a), 200.70.) In addition, the New York State Education Department guidelines mandate that Board of Education Chapter 1 staff and private school

staff coordinate their activities to achieve the educational objectives for their students.

85. Pursuant to Guidance issued by the United States Department of Education, the public school sites, neutral sites and MIUs are used for consultations concerning the Chapter 1 program between Board of Education and private school staff. (A copy of the June 1986 Guidance on Aguilar v. Felton and Chapter 1, issued by the United States Department of Education is annexed as Exhibit "9;" questions 24-28 concern consultation.) It is often extremely burdensome to hold consultations between the Board' s Chapter 1 staff and the private school staff when the Chapter 1 services are given at a public school site or leased site that is located a mile or more away from the private school. The private school staff must travel to the public school or leased site for a consultation meeting.

86. An alternative is to hold consultations between the Board' s Chapter 1 staff and private school staff by telephone. (See federal Guidance, Exhibit "9" annexed, question 28.) Obviously, this is not as effective as meetings, especially when the teachers need to refer to records

87. For CAI, the situation is even more cumbersome. The "consultation" by the Board of Education Chapter 1 teacher, who is located in a Board of Education office which may be across the City from the private school, is primarily through written computer-generated student progress reports, which are printed out in the CAI room upon electronic command. These reports are then delivered by the CAI technician to the private school principal.

88. The use of the MIUs is also cumbersome and inefficient for our Chapter 1 staff. Since there is

limited storage space for records on the MIUs, and since most of our staff is itinerant (approximately 66% of the teachers, 88% of the guidance counselors, and 100% of the psychologists and social workers who work full time, serve students from more than one private school during the course of their workweek), these professionals must frequently carry their records and files with them on a daily basis.

Costs of Compliance with the Judgment

89. Finally, taken together, the post-Aguilar delivery methods are far more costly than was the prejudgment provision of services in the private schools. The result has been a very significant expenditure of funds simply to deliver services in accordance with the judgment.

90. The Board of Education has spent $93,245,424 for the costs of compliance with the judgment for the school years 1986-87 through 1993-94. Of these

funds, $7,920,528 were taken "off-the-top" (see discussion below), in other words, from Chapter 1 funds which could otherwise have been used to provide additional instructional and support services to both public and private (including non-sectarian) schoolchildren in New York City. For ease of comprehension, a chart has been prepared showing these expenditures, broken down by year and funding source. This chart is annexed as "Chart A" and is incorporated, as though fully set forth, herein.

91. The costs of complying with the Aguilar decision have been burdensome to LEAs throughout New York State and the entire nation. Both the New York State Legislature and the United States Congress have recognized that this is a serious problem, and accordingly have made appropriations to meet some of these compliance costs.

92. After Aguilar, the State of New York allocated funds to cover part of the non instructional costs

incurred by LEAs in response to Aguilar. Section 9 of Chapter 683 of the Laws (of New York) of 1986, provided for the apportionment of $10 million dollars to LEAs around the State, allocated under Chapter 53 of the Laws of New York (the local assistance budget). Annual allocation of state funds under Chapter 53 began in the 1986-1987 school year, and continued through the 1990-1991 school year. No state funds have been allocated since then

93. In 1988, the Chapter 1 statute was amended by enactment of 20 U.S.C. § 2727(d), which authorizes appropriations for "capital expenses" incurred by LEAs throughout the nation in providing equitable Chapter 1 services to private school students. Capital expenses are expenditures for non instructional goods and services required to comply with Aguilar. (34 C.F.R. 200.57(a)(2).)

94. In addition, beginning in the 1990-91 school year, the Board has been able to use approximately 15.2 million dollars in "carryover" funds to cover some of its Aguilar compliance costs. Carryover funds are unspent funds from prior years. These carryover funds were all originally allocated for private school students, and accrued during the early years following the judgment, because the number of participating private school students decreased dramatically during those years.

95. State funds allocated pursuant to Chapter 53, federal capital expense funds allocated pursuant to section 2727(d) and the carryover funds, have been sufficient to cover most, but not all of the Board' s expenditures for compliance with the judgment. (In two years these funding sources did cover all compliance costs.) The excess expenditures (the $7,920,528 referred to above) were taken "off the top" of the Board' s total Chapter 1 allocation.

96. Regulations promulgated by the United States Department of Education require that an LEA generally take the non instructional administrative costs of providing Chapter 1 services "off the top" of the LEA's entire Chapter 1 allocation, rather than charging such costs solely to the group of students for whom they were incurred (34 C.F.R. 200 52(a)(2))

97. This off-the-top policy, which was established by the United States Department of Education prior to the Aguilar decision, applies to the non instructional administrative costs of delivering Chapter 1 services to all participating students (whether they attend public or private, including non-sectarian, school).

98. Following the Aguilar decision, the United States Department of Education stated, in its August 1985 written Guidance, that the "off-the-top" policy should also be applied to the noninstructional costs of complying with

Aguilar. (Exhibit "5" annexed hereto, p. 6, question 15.) This directive was later promulgated as a regulation. (34 C.F.R 200.52(a)(2).)

99. Although the necessity of taking funds off the top of the entire Chapter 1 allocation to meet the costs of complying with the judgment has been comparatively limited in the past, the situation will be very different in the near future.

100. New York State Chapter 53 funding ended after the 1990-91 school year and the national federal appropriation for capital expense funds, pursuant to section 2727(d), is likely to be reduced by approximately 50% for school year 1996-97 (In 1994-95, the appropriation was 41 million dollars; the United States Department of Education has requested that Congress appropriate only 20.5 million dollars for 1996-97.) It can be anticipated that New York

City' s share of the reduced national appropriation for capital expenses will also be substantially reduced.

101. In addition, the 15.2 million dollars in carryover funds which were used for compliance costs will be exhausted by the end of the 1994-1995 school year. Given this elimination and reduction of funding sources for compliance costs, if the annual costs of compliance with the judgment continue at roughly the current rate of approximately 15 million dollars, then in school year 1995-96, the Board may be forced to take approximately 5 million dollars off the top of the total Chapter 1 allocation simply for compliance costs, and beginning in school year 1996-97, the Board may be forced to take approximately 10 million dollars annually off the top of the total Chapter 1 allocation simply for compliance costs. As explained above, this is money which would otherwise be used to provide

additional instructional and support services to both public and private schoolchildren.

Specific Expenditures for Compliance with the Judgment

102. Expenditures for compliance with the judgment were made in four categories: shuttle transportation between the private schools and the public school and leased sites; the leasing of MIUs; the leasing of leased sites and administrative expenditures for CAI.

103. During the school years 1986-87 through 1993-1994, total expenditures in the four categories were: $279,877 for the (identifiable) costs of shuttle transportation; $83,729,440 for MIUs; $1,596,095 for leased sites and $1,625,487 for the administrative costs of CAI.

104. Again, for ease of comprehension, the expenditures made in these four categories are listed in the annexed Chart B. (The information set forth in Chart B is

incorporated, as if fully set forth, herein.) The figures in Chart B indicating the amount spent in various categories (e.g., MIUs, leased sites, etc.), show the actual expenditures for items in these categories; they do not include the "indirect cost" figure added to all Chapter 1 expenditures (except for purchases of equipment) to generate funds to cover general administrative overhead. Pursuant to New York State Education Department directives, for federal funds the indirect cost figure was 6.5% of the expenditure and for state funds the indirect cost figure was 5% of the expenditure. The indirect cost expenditures are described further below.

105. To set these very significant expenditures in an appropriate perspective, the total expenditures for the Chapter 1 program in New York City for all public and private (including non-sectarian) school students are listed in the annexed Chart C. (The information set forth in Chart

C is incorporated, as if fully set forth, herein). During 1986-87, the total expenditure for the Chapter 1 program in New York City, for both public and private (including non-sectarian) school students was $190,146,061. During the intervening years, Congress appropriated additional funding for Chapter 1, and accordingly, the Chapter 1 allocation for New York City has increased. During 1993-94, total expenditures for the Chapter 1 program in New York City, for both public and private school students was $425,440,299.

Shuttle Transportation

106. The Board of Education does not maintain records which distinguish expenditures for shuttle transportation between the private schools and public school sites, from expenditures for transportation between the private schools and leased sites.

107. Further, pursuant to reporting requirements of the New York State Department of Education, a portion of the Board' s costs of transporting private school students between public school sites and leased sites during the school years 1988-89, 1989-90, and 1990-91 were aggregated with other costs. The Board's expenditures for shuttle costs, as listed in this Declaration and in the annexed Chart B, are the identifiable expenditures.

MIUs

108. During the school years 1986-87 through 1993-94, the Board of Education paid an annual rental of $106,934 per MIU, which covered the use of each MIU for a 6 hour and 20 minute school day, and included the costs of the driver, garage, insurance, maintenance, and repairs. The Board has the option of using one or more of the MIUs for an additional two hours per day at a cost of $75

per hour for each MIU, and has exercised this option for a varying number of MIUs over the years.

CAI

109. Under regulations promulgated by the United States Department of Education, expenditures for computers used for CAI (as well as expenditures for CAI technicians) have been considered instructional expenditures and therefore have been charged entirely to funds allocated for private school students. (34 C.F.R. 200.57(a)(2)(ii.).) These expenditures were not paid for by funds provided under Chapter 53 or section 2727(d), since those funds are reserved for non instructional administrative expenditures. Similarly, these expenditures were not taken off-the-top of the entire Chapter 1 allocation, since that procedure is also reserved for non instructional administrative expenditures. There are, however, some non instructional administrative expenditures for CAI. These are **for central office**

expenses, such as the salaries of central office personnel who worked with CAI.

Regular Noninstructional Administrative Costs

110. There are, of course, also general non instructional administrative expenditures for operating the Chapter 1 program in New York City for both public and private school students. These expenditures have nothing to do with compliance with the judgment; they are simply the usual expenditures for administrative overhead, such as central office expenses.

111. In accordance with the terminology and practice adopted by the New York State Education Department, which audits, monitors and supervises the Board of Education's Chapter 1 program, the Board uses the term "indirect costs" to refer to the general administrative overhead costs.

112. A ceiling for indirect costs, expressed as a percentage of total expenditures (excluding purchases of equipment) is established annually by the New York State Education Department (which prohibits any assessment of indirect costs against purchases of equipment)

113. The indirect cost rate for the Board of Education during the years 1986-87 through 1993-94 was 6.5% for federal funds used in the Chapter 1 program. For the State funds provided under Chapter 53, the indirect cost rate was 5%. For record keeping purposes, the Board computes the indirect costs by adding a uniform 6.5% administrative charge to each component of its federal Chapter 1 budget, except purchases of equipment, which is effectively the same as deducting general administrative expenditures before breaking the budget into its various components, and implements the federal regulatory command that the non instructional administrative costs of

seeing both public and private school students be charged to an LEA' s total Chapter 1 funds. (34 C.F.R. 200.52(a)(2). For the State Chapter 53 funds, the Board added a uniform 5% administrative charge to each component of the budget funded by Chapter 53, except expenditures for equipment.

Generally Applicable Provisions of the Chapter 1 Program for Private School Students

114. The teachers and other personnel who provide Chapter 1 services to private school students in New York City are Board of Education employees. They are hired and assigned by the Board without regard to their religious affiliation, gender, race, national origin, or whether they speak languages other than English

115. The union which represents all teachers, guidance counselors, school social workers and school psychologists employed by the Board of Education is the United Federation of Teachers ("the UFT"). These

employees are assigned to union chapters, based on their work assignment. The employees in these four job titles who serve private-school students in the Chapter 1 program are assigned to the "Nonpublic School Chapter" of the UFT. I am informed, based on information provided by the UFT, that over 60% of these professional employees are of a different religious affiliation than the religious affiliation of the private schools whose students they serve.

116. This figure is consistent with the Board' s own information and experience. As discussed below, approximately 86% of the private school students in the Chapter 1 program attend schools affiliated with the Roman Catholic Church. Although the Board does not ask its employees their religious affiliation, it is widely-known that a high proportion of the professional staff employed by the Board is of the Jewish faith. I am informed that it is for this reason that the public schools in New York City are

closed during major Jewish holidays, whereas offices throughout New York City government remain open. Given the high proportion of Jewish staff, there has always been a concern that there would be an insufficient number of employees in attendance on major Jewish holidays to adequately staff the public schools. There is no reason to believe that the staff assigned to the Chapter 1 nonpublic school program is of a significantly different religious composition than the Board's staff in general.

117. In school year 1990-91, approximately 86% of the private school students in the Chapter 1 program attended Roman Catholic schools and approximately 8% attended Hebrew Day schools. The remaining 6% of the students attended schools that were Greek Orthodox, Lutheran, Episcopal, Ukrainian Orthodox, other denominational, or nonsectarian. These figures were not

markedly different during the years 1986-87 through 1993-94.

118. My Bureau's written guidelines for our employees provide them with instructions for carrying out their duties under the unique circumstances resulting from the judgment. The instructions are issued and distributed annually, and are designed to preserve the secular nature of the Chapter 1 program for private school students and to provide instructions concerning other matters which arise in light of the itinerant and other unusual conditions in which most of our staff perform their duties. (Copies of the guidelines for professional staff assigned to neutral (i.e., leased) sites, MIUs and CAI, and of the administrative procedures for CAI technicians, are annexed hereto as Exhibit "10.")

119. The Board of Education's collective bargaining agreement with the United Federation of

Teachers, provides that every tenured professional employee receives three such announced visits by a Board supervisor each year for purposes of a formal observation and evaluation. Every non-tenured professional employee receives three such announced visits per year. The same requirements govern all professional employees who work for the Board. In addition, Board supervisors make a number of unannounced visits to the Chapter 1 personnel who serve private school students. The total number of both announced and unannounced supervisory visits to each professional employee is approximately ten per school year.

120. Although, as discussed above, the Board's staff consult with the private school staff to achieve effective coordination of the Chapter 1 and regular school curricula, it is the Board' s staff which determines the content and methodology of the instruction and clinical and guidance services provided through Chapter 1 to the private

school students. The private school staff cannot dictate the content of instruction, or the methodology used to provide these services.

Dated: Brooklyn, New York
October 16, 1995

MARGARET O. WEISS

CHART A

EXPENDITURES FOR COMPLIANCE WITH JUDGMENT

BY FINDING SOURCE AND SCHOOL YEAR

School Year	State funds Chapter 53	Fed. funds § 2727(d)	Fed. funds Off the Top	Carryover funds	Total
1986-87	$7,506,800	N.A.	$169,701	N.A.	$7,676,501
1987-88	$7,484,000	N.A.	$954,867	N.A.	$8,438,867
1988-89	$8,600,000	N.A.	$297,221	N.A.	$8,897,221
1989-90	$8,507,618	$1,927,585	None	N.A.	$10,435,203
1990-91	$8,250,098	$3,291,362	None	$1,016,462	$12,557,922
1991-92	N.A.	$7,724,044	$3,562,720	$3,806,097	$15,092,861
1992-93	N.A.	$9,028,082	$1,823,682	$4,216,335	$15,068,099
1993-94	N.A.	$9,750,078	$1,112,337	$4,216,335	$15,078,750
TOTAL	$40,348,516	$31,721,151	$7,920,528	$13,255,229	$93,245,424

Notes

N.A. means Not Applicable

State funding under Section 9 of Chapter 683 of the Laws (of New York) of 1986, providing for apportionment of funds allocated under Chapter 53 of the Laws of New York (the local assistance budget) was not continued after the 1990-91 school year.

Federal funding for capital expenses under 20 U..S.C. 2727(d) was received beginning in the 1989-90 school year following the enactment of 2727(d) in 1988.
The carryover funds, which were unused funds from the private school (including non-sectarian) students' allocation were released by the U.S. Department of Education for compliance expenditures in June 1990.

Pursuant to New York State Department of Education guidelines, the state Chapter 53 funds include a 5% indirect cost charge for all expenditures except equipment.

The other funding sources are all federal funds, and pursuant to New York State Department of Education guidelines, include a 6.5% indirect cost charge for all expenditures except equipment.

CHART B

EXPENDITURES FOR COMPLIANCE WITH JUDGMENT

BY TYPE OF EXPENDITURE AND SCHOOL YEAR

1986-87	MIU Costs	Leased Site Costs	CAI Administrative Costs	Shuttle Transportation Costs	Total
1986-87	$7,149,33	$135,532	N.A.	$ 26,630	$ 7,311,495
1987-88	$7,335,887	$387,963	$ 88,731	$ 104,531	$ 7,917,102
1988-89	$7,549,249	$279,082	$ 273,032	$ 25,248	$ 8,126,611
1989-90	$9,157,444	$198,508	$ 348,942	$ 31,329	$ 9,736,223
1990-91	$11,126,541	$280,402	$ 225,711	$ 28,211	$11,660,865
1991-92	$13,790,999	$151,832	$ 205,801	$ 23,068	$14,171,700
1992-93	$13.810,752	$ 75,106	$ 237,922	$ 24,672	$14,148,452
1993-94	$13,809,245	$ 87,670	$ 245,348	$ 16,188	$14,158,451
TOTAL	$83,729,440	$1,596,095	$1,625,487	$ 279,877	$87,230,899

Notes -

N.A. means Not Applicable

The dollar figures above are actual expenditures - they do a include the indirect cost additions (5% for state funds and 6.5% for federal funds except for equipment) which were included in the figures in Chart A

Shuttle Transportation Costs are not complete after the 1987-88 school year, because pursuant to New York State Education Department reporting requirements, some of these costs were aggregated with the costs of MIUs The shuttle transportation costs presented for school year 1988-89 and for the following years, represents the identifiable costs of shuttle transportation costs; the balance of these costs are included in the total MIU costs.

CAI Costs - These expenditures are only for administrative expenses, such as salaries and equipment for central office administrative personnel who work on CAI. Pursuant to federal regulation 34 C.F.R. 200.57(a)~2)(ii), expenditures for computers and software used for CAI, as well as the salaries of the CAI technicians, have been considered instructional expenditures. These expenditures have therefore been charged solely to Chapter 1 funds allocated for private school students, and are not included in the above table.

CHART C

TOTAL EXPENDITURES FOR CHAPTER 1 PROGRAM IN NEW YORK CITY FOR BOTH PUBLIC AND PRIVATE SCHOOL STUDENTS

BY SCHOOL YEAR

SCHOOL YEAR	TOTAL EXPENDITURES
1986-1987	$ 190,146,061
1987-1988	$ 197,657,498
1988-1989	$ 257,512,021
1989-1990	$ 327,733,794
1990-1991	$ 363,065,833
1991-1992	$ 382,904,292
1992-1993	$ 419,182,808
1993-1994	$ 425,440,299
TOTAL	$ 2,563,642,606

Note

These total figures include the expenditures for all Chapter 1 services provided to both public and private (including non-sectarian) school students, whether centrally, by the Chancellor, or by the community school districts.

AFFIRMATION OF STANLEY GELLER SUBMITTED IN OPPOSITION TO PETITIONERS' RULE 60(B) MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

78CV-1750 (Jg)

Plaintiffs,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINES, and BELINDA WILLIAMS,

Defendant-Intervenors.

----------x

STANLEY GELLER, an attorney admitted to practice in the courts of the State of New York, under penalties of perjury, affirms the following:

Introduction

1. As attorney for the plaintiff in this action, I submit this affirmation in opposition to the motions of the defendant Chancellor of the Board of Education of the City of New York ("Chancellor") and the defendant-intervenors (Intervenors). As will be noted more fully in plaintiffs' accompanying memorandum of law, it is of the utmost significance that the defendant Secretary, United States Department of Education ("Secretary") has not made a similar motion or joined in the motion of the Chancellor or that of the Intervenors, but has flatly acknowledged that this Court does not have the power to grant the motions of his fellow defendants.

2. Plaintiffs' position is precisely that of the Secretary. We respectfully submit that this Court lacks the power to overrule the mandate of the United States Supreme Court in *Aguilar v. Felton*, 473 U.S. 402 (1985), which affirmed the unanimous decision of the Court of Appeals of this Circuit (sub nom., *Felton v. Secretary, United States Department of Education*, 739 F.2d 48 [2d Cir. 19843), and held that the Establishment Clause of the First Amendment to the United States Constitution prohibits the use of public funds to finance a plan or program employing public school teachers and other public personnel to provide instruction and counseling to students of religious schools on the premises of those schools.

3. What the Chancellor and the Intervenors now seek from this Court is an order or judgment that would relieve them from obeying that mandate. They seek such relief, moreover, knowing that it may not properly be

granted by this Court, but intending, after their motion is denied, to appeal from the decision of this Court to the Court of Appeals, knowing that their appeal may not properly be heard by that Court, and intending thereafter to apply for a writ of certiorari in the Supreme Court, in the hope that six Justices will be willing to grant the writ, and thereby to allow the applicants effectively to obtain a belated, second appeal to the Supreme Court from the determination of the Court of Appeals in *Aguilar*. It is respectfully submitted that no such procedure is permitted by any statute, rule or regulation, and that if any private citizen were to follow the same procedure, he or she would be sanctioned. The Chancellor and the Intervenors deserve the same treatment, no matter how noble they may claim their end to be.

4. Plaintiffs trust that this Court will not allow itself to be used as part of such a ploy. We ask the Court,

therefore, to decline to entertain the present motions, and to require the Chancellor and the Intervenors, if they are so advised, to seek a writ of mandamus from the Court of Appeals which we do not believe that Court will issue.

The Need for a Plenary Hearing

5. Although plaintiffs firmly adhere to our position on the law of this case, we are concerned that the factual claims of the defendants, and particularly those of their chief spokesperson, the Board of Education' s Margaret Weiss may be considered on their alleged "merits." As will be noted below, many, if not most, of the Weiss claims are based on pure hearsay. Others are based on conclusory generalizations. Still others are questionable on their face. In any and all events, all of those claims must fully and properly evaluated and considered in the light of the principle of separation of church and state embodied in the Establishment Clause, a

principle that was of such primary concern to our constitutional forefathers that they made it the first clause of the first of the ten Amendments to the Constitution that constitute the Bill of Rights. (See, the opinion of Justice Black, speaking for the major it,v of the Court in *Engel v. Vitale*, 401 U.S. 1 [1962].) If, therefore, and only if, this Court sees fit to entertain the pending motions, so as to enable them, improperly, to reach the Supreme Court, it is respectfully submitted that this Court should direct a plenary hearing of the Weiss claims in order that there will be an adequate record for the High Court.

The Bedrock Concerns Of Religious Liberty

6. It bears emphasizing that the Weiss claims relate only to educational concerns, as if those were the only concerns that need be considered in this matter. The same is true of the contents of all the other moving papers, except to the extent that they, tangentially, deal with

religious liberty concerns in their discussion of recent Supreme Court decisions. That such focus is deliberate and intended to divert this or any other Court' s attention from religious liberty concerns is made clear by the choice of terminology. After noting that *no less than 99%* of the private schools in this City whose students receive Chapter 1 services are "private religious schools" (there are, of course, no public religious schools), Weiss, and defendants generally throughout their papers, chose to refer to the schools in question as "*private*" schools rather than "*religious*" schools!

7. One critical set of facts has clearly been established by the highest and best authority (a) the primary mission of the Roman Catholic parochial schools, whose students defendants acknowledge - constitute 86% of the religious school students in this City who receive Chapter 1 services, is to imbue their young wards with a firm and

lasting belief in the principles and practices of Roman Catholicism; (2) the subjects taught in those schools that might otherwise appear to be entirely secular are part and parcel of a curriculum and extracurricular activities that serve to further the primary religious mission of the schools; and (3) services rendered to the students of those schools also support the schools and their primary religious mission. One authority to which plaintiffs refer is Justice Brennan, speaking not only from the facts of record in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but also from personal knowledge and experience, when he stated that --

> ". . . the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence." (403 U.S. at 616-17, Brennan J. concurring)

8. The foregoing statement was subsequently quoted with approval by Justice Stewart in *Meek v. Pittenger* 421 U.S. 349, 364 65 (1975).

9. More recent, and perhaps even more competent, authority, stressing the rededication of Roman Catholic schools in New York City to their primary religious mission is to be found in the following statements of Roman Catholic Bishop Thomas V. Dailey in a pastoral letter issued to the 1,500,000 parishioners in the Brooklyn Diocese, as quoted in *The New York Times* of December 1, 1993, page B1.

> "The primary mission of the parochial schools remains 'the teaching of the Catholic religion,' the bishop said, responding to concerns that Catholic education had been losing its sense of purpose as nuns disappeared from the classrooms and the number of non-Catholic students increased

> "'Each school will be mandated to develop and publish a mission statement, which will include a statement of 'Catholic Identity,' Bishop Dailey said. That identity 'is paramount,' he said. Without it, the Catholic school 'has no reason for existence'"

10. That the same set of facts applies, perhaps even more forcefully, to the Hassidic schools, whose students defendants acknowledge constitute the next largest group in this City receiving Chapter 1 services. (See, the opinion of Justice Souter speaking for a majority of the Court in *Board of Education of Kiryas Joel School District v. Grumet*, 114 S. Ct. 2481 [19941.)

11. A preliminary Weiss claim which the Board spokesperson makes as if it were axiomatic, is apparently intended to avoid the thrust of the foregoing authoritative statements:

> "The Board provides Chapter 1 services only to eligible students who attend private schools; it does not provide services to the private schools, nor to the general student populations of these schools." (Weiss Decl, p.5, par. 14.)

12. It is respectfully submitted that one does not need to be an education exert to appreciate the fact that using public funds to improve the scholastic qualifications of the below grade-level students in a religious school effectively provides at least three distinct and valuable services to the school and its general student population (a) it enables the school to avoid spending the time, effort and/or money for that purpose or to spend the same for another purpose or other purposes that it might otherwise have to spend for that purpose; (b) it enables the school' s teachers and grade level, as well as below-grade-level, students to proceed with their regular classroom

instruction more quickly and effectively; and, of course, (3) it raises the school' s scholastic reputation and attracts better students.

13. It is respectfully submitted that it is against the foregoing factual background that the defendants' educational concerns and claims must be considered and will be considered below. Preliminarily, however, it is necessary to show that their relevance, materiality and alleged merit are based on certain assumptions that are either clearly erroneous or at best challengeable.

The Erroneous Assumptions in Defendants' Claims

14. There are several erroneous assumptions in defendants' claim for relief from the mandate of the Supreme Court in *Aguilar*. The first and most obvious is that the request for relief is misdirected. The determination in *Aguilar* does not require the Secretary, the (Chancellor or any other government official or agency

to spend one cent towards providing Chapter 1 services in any form to religious students *off the premises* of their home schools. The determination under consideration does no more than to prohibit the use of public funds to provide Chapter 1 services *on the premises* of those school. The alleged burden of providing Chapter 1 services to religious school children under New York City's current plan is the result of determinations made by the Congress, the Secretary and the Chancellor rather than the Supreme Court in *Aguilar*.

15. This first erroneous assumption is especially pertinent to the chief complaint of the moving defendants which is directed against the lack of federal funds in the present and foreseeable future to defray the "non-instructional costs" involved in the City' s present plan. The moving defendants point out that, because of the lack of federal funds, the money to defray the

non-instructional costs will now come "off the top" of the Chapter 1 funds allocated to the City. That procedure substantially reduces the amount of the City' s allocation available for Chapter 1 instructional services. (As plaintiffs have noted, the procedure also effectively makes the public schools students eligible to receive Chapter 1 services pay for the cost of furnishing those services to religious students.) The procedure in question, however, is the result of a determination made by the Congress which has decided to spend less money on education and by the Secretary who devised the "off-the-top" procedure, not by the Supreme Court in *Aguilar*.

16. A second erroneous assumption of the defendants is that the alleged burden of providing Chapter 1 services to religious students "off premises" is pertinent to the real issue the moving defendants seek to raise in the present improper proceeding, which is whether the

Supreme Court ought to overrule *Aguilar*. If, as the Court held in *Aguilar*, using public funds to provide Chapter 1 services on the premises of religious schools is constitutionally impermissible solely because of "excessive entanglement" of church and state (as defendants claim) or because of its "primary effect" of advancing religion as well (as plaintiffs claim), it is clear that the alleged burden of providing Chapter 1 services "off premises" is immaterial if not wholly irrelevant. For example, the necessity of compliance with the constitutional right of trial by jury is undoubtedly a burden, financially and otherwise, on our Judicial system, but it is more than doubtful if a motion for relief from that "burden" would be entertained by this Court or any court in this connately. If, on the other hand, the determination in *Aguilar* is incorrect, and the practice of providing Chapter 1 service "on premises" is constitutionally permissible, then there

is certainly no need to consider the burden of providing Chapter 1 services "off premises."

17. A third erroneous assumption of defendants is that in the provision of Chapter 1 services to religious school students in public schools ("Public School Sites") the religious school children should be deemed to be in a category inferior to that of public school students rather than an equal part of the general student population of this City. This particular assumption, of course, is in direct contradiction to defendants' "child benefit theory" and their claim that the purpose and effect of the Chapter 1 statute and the New York City plan is to provide Chapter 1 services to students without regard to whether they regularly attend religious schools or public schools. More to the point, this assumption undercuts defendants' claim that the high "noninstructional costs" of providing Chapter 1 services to religious school students is the result of lack

of space at Public School Sites, where, defendants acknowledge, such costs are minimal.

18. To the extent that, since *Aguilar*, an increase in the student population in New York City, has resulted in a shortage of space in the public schools of the City, it is respectfully submitted that such shortage may not properly be used, as defendants use it, as an excuse for excluding religious school students from receiving Chapter 1 services in public schools, any more than it is used to exclude public school students from receiving any type of educational census in those schools. Viewed in that light, the alleged high cost of providing Chapter 1 services to religious school students "off premises" at other than Public School Sites, such as in expensive mobile instructional units ("MIUs") is the result of a solution adopted or followed by the Chancellor or Board of Education of the City of New York (Board of Education

or "Board") to resolve the problem of shortage in space in the public schools of this City by first excluding religious school students from receiving Chapter 1 services in public schools before excluding public school students from receiving any type of services in those schools. That solution is not the necessary result of the determination of the Supreme Court in *Aguilar*.

19. The foregoing view is confirmed by events that occurred in the year following *Aguilar* when the Chancellor' s predecessor in office was developing the current New York City plan (the "Alternative Plan") for providing Chapter 1 services to religious school students "off premises." It is a matter of written record that the central feature of the original plan developed by the former Chancellor was an offer to the principals of 80% of the religious schools whose students had received Chapter 1 services "on premises" prior to Aguilar to have

their students receive those services at "matching" public schools close by their religious schools. (Fourth Bi-Monthly Report of the Chancellor to Judge Neaher, p. 9, par. 26, a copy of which is annexed to this affirmation as Exhibit A) That offer was flatly rejected by the principals of the schools to whom it was made and by the parents of the students at those schools.

20. That situation with respect to space continued until the school year 1990-91, as shown by the chart annexed as "Figure 2" to the 1995 report of Alan G. Hevesi, the Comptroller of the City of New York, entitled "Overcrowding in New York City Public Schools: Where Do We Go from Here." (See, Weiss Decl., Exh 7.) There was little or no excuse, therefore, based on shortage of space in public schools for failing to provide Chapter 1 services to religious school students at Public School Sites for several years after *Aguilar*. The Hevesi Report,

moreover, makes it clear that there was no good reason for failing to provide Chapter 1 services to religious school students at such sites in and after 1990-91 under the same emergency conditions that have been adopted by the Chancellor (or Board of Education) or are suggested in the Report for providing educational services to public school students.

21. Which leads to a fourth erroneous, or at best questionable, assumption of defendants which is that Public School Sites sites are allegedly unsuitable for providing Chapter 1 services to religious school students. The alleged reasons are set forth in the Weiss declaration where they are made to appear as if they are based on solid fact and professional expertise. It is respectfully submitted that on closer scrutiny it becomes apparent that the brief statement of the alleged reasons in the Weiss declaration contains only conclusory generalizations of

which the declarant does not even profess to have personal knowledge on a subject that clearly does not require any special expertise. It is respectfully repeated, therefore, that, if the pending motions are allowed to go forward, the allegations in the Weiss Declaration concerning the alleged high cost of compliance with *Aguilar* should be the subject of a plenary hearing.

The Weiss Claims Concerning the alleged Burden of Compliance with Aguilar

(A) The Claims concerning the Unsuitability of the Public School Sites

22. Initially, it should be noted that since the only sites for providing Chapter 1 services to religious school students in use in the City's present plan that plaintiffs do not believe to be in violation of the Establishment Clause are the Public School Sites, it would be inconsistent if not hypocritical to challenge the Weiss claims with respect to the suitability of the other sites.

23. The reasons alleged in the Weiss Declaration for the alleged unsuitability of Public School Sites are: (a) the time lost by religious school students travelling between their home school and such sites; (b) the alleged dangers that might be encountered on the way; (c) the alleged lack of individualized instruction; and (d) the alleged lack of consultation between Chapter 1 personnel and their religious school counterparts.

24. The lack of merit in the first two of these alleged reasons becomes apparent when it is revealed that most of the matching Public School Sites in the offer made by the Chancellor' s predecessor in office were, and still are, no more than a block away from the religious schools with which they were paired. The Chancellor' s predecessor estimated that the time lost in travelling between the paired sites would be approximately 10 minutes (Exh. A annexed hereto, p. 8, par. 22) which is

no more than the standard time for a recess between classes. The alleged dangers en route are even more questionable. It is conceivable, but not likely, that harm might befall religious students walking between their home schools and nearby Public School Sites, and even less likely if the students are moved by minibus or other vehicle. In any event, the Weiss Declaration is devoid of any specific example of any actual harm coming to any religious school student while travelling between his home school and a Public School Site on any occasion in the last decade.

25. The first two reasons given in the Weiss Declaration for the alleged unsuitability of Public School Sites were the same as those given by the principals and parents of religious school students when the Chancellor's predecessor made his offer of matching Public School Students in 1986. It has always been the position of

plaintiffs that those reasons were so transparently without merit that they constituted an attempt to camouflage the opposition of both principals and parents to any plan or program that would require their students to attend public schools for any purpose. The issue thus raised by plaintiffs has never been given a full airing, and, it is respectfully submitted, provides another reason why, if this proceeding is allowed to be a vehicle for having the Supreme Court reconsider it determination in *Aguilar*, there should be a plenary hearing herein.

26. The third reason alleged in the Weiss declaration for the unsuitability of "off premises" sites (alleged lack of face-to-face communication) is so obviously not applicable to Public School Sites that it is not considered by the declarant in connection with such sites, but only in connection with computer-assisted instruction ("CAI") which is actually provided to religious

school students "on premises" or at home. (Weiss Decal., pars. 75, 82.) With respect to the final reason (alleged lack of consultation between Chapter 1 personnel and their religious school counterparts), it is conclusorily stated that

> "It is often extremely burdensome to hold conversations between the Board's Chapter 1 staff and the private school staff when the Chapter 1 services are given at a public school . . . that is located a mile or more away from the private school .... (Id., par. 85.)
>
> An alternative is to hold consultations between the Board's Chapter 1 staff and private school staff by telephone.... Obviously, 'this is not as effective as a meeting, especially when the teachers need to refer to records." (Id,, par. 85.)

27. As indicated, one answer to the foregoing is that it is unusual for a Public School Site to be "more than one mile or more away from the private [religious] school"

with which it is paired. Secondly, even if the two schools were a mile or more apart, it hardly would seem to be "extremely burdensome" for a conscientious religious school teacher to make the trip a few times in a school year. (Although in this respect the Weiss declaration refers to a federal "guidance" document [Decl., Exh 9, par. 28], neither the declaration nor the "guidance" document gives any indication of how often the religious school teacher ought to make the trip. Lastly, there should be no difficulty in consultations by telephone if copies of records are transmitted by mail prior to such consultations. It is respectfully submitted that the Weiss claim with respect to consultations attempts to make a mountain out of a molehill.

(B) The Claims concerning the Alleged "Costs of Compliance with the Judgment"

28. A large part of the Weiss declaration deals with the financial costs of providing Chapter 1 services to

religious students "off premises." It is respectfully submitted, however that any extended consideration of such costs is unnecessary for several reasons: (a) plaintiff do not challenge the figures quoted in the declaration; if anything, we believe they are even greater than quoted; (b) as noted, by far the greatest portion of these costs are "noninstructional" costs attributable to MIU' s the use of which we considered to be in violation of the Establishment Clause; (c) non-instructional costs attributable to Public School Sites are minimal; and (d) lastly, but by no means least importantly, it bears repeating that, assuming for argument purposes, but hardly conceding, that this proceeding should be allowed to be used as a vehicle for the Supreme Court reconsidering its determination in *Aguilar*, neither the alleged financial costs nor the other alleged burdens of New York's current plan for providing

Chapter 1 services to religious school students are material or relevant to that issue.

29. The figures cited in the Weiss declaration nevertheless require two comments. First of all New York City' s contract, recently renewed, and the expenditures thereunder for MIUs, the most important component of the City' s current plan for providing Chapter 1 service to religious school students, has been roundly criticized as being extremely extravagant by the office of Comptroller Hevesi' s predecessor, Harrison Goldin. (Letter dated April 26, 1988 from Roger D. Liwer, Director of Audits of the Comptroller' s office, to Steven Schwager, Chief School Business Executive of the Board of Education, a copy of which is annexed hereto as Exhibit B.) Secondly, it was brought to the attention of the Chancellor' s predecessor in office that, whereas an MIU costs $106,000 per unit per year, a standing unit of the same proportion could be

constructed a few years ago for a non-recurring cost of only $50,000. If such standing units were installed in the corners of playgrounds at matching Public School Sites, they would immeasurably reduce the cost of providing Chapter 1 services to religious school students "off premises."

Conclusion

30. It is respectfully repeated that, as noted in the memorandum of the Secretary, the motions of the Chancellor and the Intervenors are improper, obviously known to the movants to be so, and, accordingly, should not be entertained.

31. Alternatively, if entertained, and thereby allowed to be a vehicle for having the Supreme Court reconsider its determination in *Aguilar*, it is respectfully submitted that there should be a plenary hearing to determine the actual and detailed facts pertinent to the

alleged burden of compliance with that determination so that there will be a complete and intelligent, record before the Supreme Court.

32. Lastly, if the pending motions are entertained, with or without a hearing, they should be denied with sanctions imposed on the moving defendants.

Dated: December 26, 1995

STANLEY GELLER

REPLY DECLARATION OF MARGARET O. WEISS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINES, and BELINDA WILLIAMS,

Defendant-Intervenors.

----------x

REPLY DECLARATION

78CV-1750 (JG)

MARGARET O. WEISS, declares, pursuant to 28 U.S.C. 1746, under penalty of perjury under the laws of the United States of America, that the following is true and correct:

1. I am the Director of the Bureau of Nonpublic School Reimbursable Services of the Board of Education of the City School District of the City of New York. I submit this declaration in reply to plaintiffs' opposition to defendant Chancellor of the Board of Education of the City of New York' s motion for relief from the judgment in this action, and in further support of the Chancellor' s motion.

Public School Sites and Spays Limitations

2. As noted by plaintiffs' counsel, Stanley Geller, in his declaration date December 26, 1995 (hereafter "Geller Decl.") (at paragraph 19), when the post-Aguilar plan was developed in the spring of 1986 to comply with this Court' s judgment, the Board of

Education of the City School District of the City of New York (hereafter the "Board of Education" or the "Board") was able to offer services in public school sites to the Chapter 1 students in 80% of the participating private schools, or 194 of the 242 participating private schools. (The term "private school," as used herein, refers to schools which are affected by the judgment m this case.)

3. However, of these 194 private schools, the parents and principals of only 52 private schools accepted the offered public school sites. Thus, only 3,578 private school students received Chapter 1 services at public school sites during school year 1986-1987. As discussed in my Declaration of October 16, 1995 in support of the Chancellor' s motion (hereafter "Initial Weiss Decl.") (at paragraph 32), the primary reasons given for declination of the public school sites were the loss of classroom instructional time caused by travel time between the private

and public school sites, and concerns regarding safety during transit between the private and public school sites.

4. Even in the 1986-87 school year, there was insufficient space in the public schools to accommodate all private school students who had been receiving Chapter 1 services. Accordingly, 70 Mobile Instructional Units were obtained to provide additional sites for Chapter 1 services for private school students. Further, 13 Leased Sites were obtained which also provided additional space for Chapter 1 services.

5. However, during the 1986-1987 school year, the use of these three methods of service delivery resulted in only 10,661 private school students from 141 private schools receiving Chapter 1 services in New York City. This was an enormous decrease in the number of private school students served. During the 1985-1986 school year (the final year in which the Board provided Chapter 1

services to private school students by sending its teachers and other professional staff into the private schools) 20,965 students from 247 private schools received Chapter 1 services in New York City. Accordingly, 10,304 fewer private school students received Chapter 1 services in New York City after the post-Aguilar plan was implemented. This represents a decrease of approximately 50% in the number of private school students served by Chapter 1.

6. This loss of services for 10,304 students, who were in need of remedial education because of below grade educational achievement, and who resided within defined poverty areas, was an educational tragedy. Accordingly, the Board of Education worked to develop and expand the other methods of service delivery--Computer Assisted Instruction, Mobile Instructional Units and leased sites which are now used to provide Chapter 1 services for private school students (in addition to public

school sites). Over the intervening years, the use of these three other service delivery methods has resulted in the restoration of the participation level of private school students in the Chapter 1 program to approximately the pre-Aguilar level; in school year 1993-1994, the Board of Education provided Chapter 1 services to 21,795 students from 257 private schools.

7. Further, as is thoroughly described in the January 1995 Report of Alan G. Hevesi, Comptroller of the City of New York, Overcrowding in New York City Public Schools: Where Do We Go from Here? (the report is annexed as Exhibit "7" to the Initial Weiss Decl., see also paragraphs 35-38 of the Initial Weiss Decl.), since 1989, there has been an explosive growth in public school enrollment in the City of New York, which has led to severe overcrowding in the public schools. The public school population has grown 10%, from 940,208 students

to 1,034,235 students, in the eight year period from October 1986 to October 1994. As a result, the public school system is now so crowded that 90,000 students, which is 9% of the public school population, lack regular classroom seats.

8. As a result of the severe overcrowding, the Board of Education has lost 23 of the public school sites that it used for Chapter 1 services for private school students in the early years of the post-Aguilar Chapter 1 program. Thus, the availability of pubic school sites for the provision of Chapter 1 services to private school students is significantly less now than it was in 1986, when the post-Aguilar plan was first developed. Nor is the situation likely to improve. The Comptroller finds that there is insufficient time and, due to the current budget problems, insufficient funds, to build enough new public school facilities to meet the need for increased public

school space. Further, based on studies of patterns of birth rates and immigration, it is projected that the current extraordinary growth rate (an increase of approximately 20,000 students per year) will continue into the next decade, and that the severe overcrowding situation will get even worse. The projection is that the enrollment in the New York City public schools will increase by over 240,000 in the nine years between 1993 and 2002. In 2002, the projected total public school enrollment will be over 1,256,000. (Exhibit "7" to the Initial Weiss Decl. pp. ES-1, 23-27, 36).

9. Plaintiffs' counsel asserts that notwithstanding this severe overcrowding situation, the Board of Education should serve all private school students receiving Chapter 1 services at public school sites, and then suggests that this can be done by utilizing the same methods to reduce overcrowding for public school students

proposed in the Comptroller's Report. (Geller Decl., paragraph 20).

10. First, as the Comptroller's Report makes clear, the principle proposed methods to relieve overcrowding for public school students--building new schools or expanding existing schools (Exhibit "7" to the Initial Weiss Decl., pp. 26-27, 36, 51), bussing students to schools which are often far from their homes (Exhibit "7," pp. 30-35), "double shifting" (having the student population attend school on two different schedules during the day) and changing to a year-round school calendar (Exhibit "7," pp. 43-49)--have not yet been either implemented or widely implemented for the variety of reasons discussed in the Report, and where implemented, have not been successful in adequately addressing the existing overcrowding problem for the public school student population.

11. According to the Comptroller's Report, building or expanding schools is both too slow and too expensive (Exhibit "7" to the Initial Weiss Decl., p. 36), bussing students to distant schools meets with strong resistance from public school parents who do not want their children to spend additional travel time and do not want them attending school in a remote location (Exhibit "7," p. 32) and "double shifting" can adversely affect both the quantity and quality of education, by creating such problems as school days beginning and/or ending after dark, the disruption of after school activities and deterioration in the quality of the school environment (Exhibit "7," pp. 38-42). The proposed year-round school calendar has not been implemented in New York City, and prior to implementation, there would be many problems to overcome, such as the absence of air conditioning, parent

and staff resistance and legal requirements. (Exhibit "7," pp. 48-50).

12. Further, the problems created by bussing public school students to distant schools for the entire school day, are even more problematic for Chapter 1 private school students, who are normally receiving Chapter 1 services for approximately one hour during their regular school day. It is simply not possible to bus private students to a distant public school site during the course of their regular school day; the loss of their regular class instructional time would be too great. In addition, double shifting is not even relevant to these private school students, since they are receiving Chapter 1 instruction for approximately an hour during a school day. Furthermore, their regular school day schedule is established by their private school, not by the Board of Education.

13. Finally, another solution to relieve overcrowding discussed by the Comptroller is the use of leased space for classroom use. (Exhibit "7" Initial Weiss Decl., pp. 27-30). This is a method the Board of Education already utilizes to provide Chapter 1 services to private school students.

The Cost of Mobile Instructional Units (hereafter "MIUs")

14. Plaintiffs' counsel states that the cost of the MIUs was found to be "extremely extravagant" by the Office of the Comptroller of the City of New York (Geller Declaration, paragraph 27) and attaches a letter as Exhibit "B," to his Declaration, dated April 26, 1988, from Roger D. Liwer, Director of Audits of the Office of the Comptroller to Steven Schwager, Chief School Business Executive of the Board of Education. This letter does not state that the cost of the MIUs was "extremely extravagant," although the letter does state that the Board

should have obtained MIUs at less cost. In addition, this letter is not a final report of the Comptroller's Office, but as stated on page 1 of the letter, simply documents some "preliminary findings."

15. Plaintiffs' counsel has not attached Mr. Schwager's response to Mr. Liwer, by letter dated April 28, 1988, which is annexed hereto as Exhibit "1." Mr. Schwager pointed out many errors and incorrect assumptions in Mr. Liwer's letter. For example, Mr. Schwager noted that the conclusion that the cost of the Board of Education's MIUs was higher than necessary, was based in large part on a "cost" comparison of the Board' s mobile instructional units with mobile instructional units used in other jurisdictions, and that the comparison was defective. Mr. Schwager pointed out that the costs of most MIUs from other jurisdictions cited by Mr. Liwer covered only the cost of the vehicle. Mr. Liwer then compared that

cost to the Board of Education's cost. However, the Board of Education's cost figure includes not only the cost of the vehicle, but the cost of the unionized driver (whose salary and fringes exceed $30,000 per year), as well as the costs of maintenance, repairs, cleaning, garaging, fuel and insurance.

16. In addition, the Board of Education's MIUs were not a standard model, but were custom designed. Although this made each unit more expensive, as Mr. Liwer noted, it allowed the Board of Education to design each MIU to simultaneously house two Chapter 1 functions; the custom design contains both an instructional area for a staff person and up to ten students, and a second small group area in which a staff person (such as a guidance counselor or school psychologist) can meet with a student and/or parent, an English as a Second Language teacher can provide small group instruction for up to four

students, and consultation between staff or between a parent and staff can be held. Had the Board of Education used the same standard models as other jurisdictions cited by the Office of the Comptroller, only one activity could have occurred in each MIU at any one time. The cost of each unit would have been somewhat less, but a significant number of additional units would have been required to fulfill the same functions and the overall expenditure for MIUs would have been greater. Finally, the custom design allowed the Board of Education to incorporate very stringent safety features in the design, as mandated by the New York City Fire and Building Departments.

17. Plaintiffs' counsel also states that the Board of Education could have obtained Stationary Instructional Units (hereafter "SIUs"), which are small structures built to accommodate Chapter 1 classes. (Geller Decl., paragraph 27). Although the Board has not used SIUs as

a post-Aguilar delivery method, we did investigate the possibility of using them in our post-Aguilar program.

18. There were several concerns about the use of SIUs. The first was a legal concern. At the time this method was under consideration, in 1987 and 1988, there were serious legal concerns raised by the placing of SIUs on property owned by religiously-affiliated private schools. The New York State Education Department initially stated, in July 1985, that this was prohibited by Aguilar (see Memorandum from Robert D. Stone, Counsel and Deputy Commissioner for Legal Affairs for the State Education Department, annexed as Exhibit "6" to the Initial Weiss Decl.), and the United States Department of Education stated in June 1986, that SIUs could be placed on the property of religiously-affiliated private schools only in limited circumstances. (See June 1986 Guidance on Aguilar v. Felton and Chapter 1 of the Education

Consolidation and Improvement Act, Questions and Answers, question 29, annexed as Exhibit "9" to the Initial Weiss Decl.). The Board accordingly planned to use SIUs, if at all, only in a small pilot program, which could serve to test their legality.

19. With great difficulty, the Board was able to locate three sites after extensive canvassing of the private schools to find available land on either private school property or other nearby available land, such as an empty lot. Vacant land is an extremely scarce commodity in many New York City neighborhoods.

20. We then began investigating the cost of constructing the SIUs. Initially, we anticipated that the cost would be relatively inexpensive, and that we could simply obtain a slightly modified version of the trailers that are used on construction sites. However, it seems that no endeavor of this nature is ever simple or inexpensive in

New York City. For example, in addition to all the New York City health and safety code requirements, we learned that we would also have to comply with any design requirements imposed by the Municipal Art Commission, a body created by the New York City Charter, which is empowered to review designs for buildings and other structures erected on land owned or leased by local government. We met with the Commission, which proposed significant design modifications to make the structure more visually appealing. (It should be emphasized that their concern was primarily for the exterior appearance and the visual impression given to anyone who would use the street, rather than for the interior of the structure, which would most affect the students.) The Commission suggested we put a peaked roof on the structure, criticized the visual rhythms created by the fenestration (i.e., the windows), etc.

21. We also determined that obtaining an electricity hook-up would be costly. When all these factors were considered, we estimated that the initial cost for constructing each SIU would be $100,000. (See Exhibit "2" annexed hereto, letter to Robert Esnard from Steven Schwager, dated May 26, 1987). Further, the likelihood of vandalism in these high-crime areas was a problem that would have to be addressed through additional operating expenditures for security, insurance and maintenance and repair services. Accordingly, SIUs did not appear to be nearly as cost-effective as originally anticipated.

22. Plaintiffs' counsel also asserts (Geller Decl., paragraph 27) that we could have placed SIUs in "the corners of playgrounds" on public school property. This would have deprived the public schools of a portion of their schoolyards, which are normally used for recreation and physical education. The number of Chapter 1 students in

many private schools would have required several SIUs to accommodate the program. This would have meant the loss of a substantial amount of the very limited open space available to the public school. Based upon information provided by the Board's Division of School Facilities, there is no record that any public school has ever been forced to give up a portion of its schoolyard for the benefit of students from another public school or a private school. Further, it is almost certain that plaintiffs' counsel's proposal would have been bitterly opposed by the affected public schools.

23. In addition, plaintiffs' counsel's proposal would have necessitated the same loss of instructional time through travel that has previously been described in relation to public school and leased sites. One of the primary reasons for using SIUs would have been to eliminate travel and the resulting loss of instructional time.

Additional Factual Assertions

24. Plaintiffs' counsel further asserts (Geller Decl., paragraph 10) that the defendants acknowledge that students who attend Hasidic schools constitute the second largest group of private school students receiving Chapter 1 services in New York City. This statement is inaccurate and has not been acknowledged by defendants. The second largest group of private school students receiving Chapter 1 services in New York City are students attending Hebrew Day Schools. This is a term which is used by the Board of Education to denote all schools which are affiliated with any branch of the Jewish religion. Thus, a Hebrew Day School may be affiliated with a Hasidic Jewish organization, an Orthodox Jewish organization, a Conservative Jewish organization, etc. The Board of Education makes no official inquiry, in the course of administering the Chapter 1 program, as to the affiliations

of the Hebrew Day Schools whose students participate in the Chapter 1 program. However, for the purpose of preparing this declaration, a member of my staff who has personal knowledge of the affiliations of the Hebrew Day Schools, reviewed the list of the 42 schools whose students participate in the Chapter 1 program, and informed me that 11 of these schools are affiliated with Hasidic Jewish groups and the remaining 31 Hebrew Day Schools are not affiliated with Hasidic Jewish groups.

25. Plaintiffs' counsel also states that there is a "standard time for a recess between classes" of approximately 10 minutes (10 minutes is the maximum one-way vehicular travel time used in the transport of private school students to Chapter 1 sites). (Geller Decl., paragraph 24). However, approximately 85% of the private schoolchildren served in the Board of Education's Chapter 1 program are in the elementary school grades

(kindergarten through sixth grade). In elementary school grades, in both the public and private schools, there are no regular class changes nor recess between classes; students are in one class, and normally stay in the same room with the same teacher for the full school day. Accordingly, when private school students travel to a public school (or leased) site for Chapter 1 instruction during the course of the school day, the time spent traveling is normally time in which they would otherwise be receiving instruction in their regular school class, not "recess" time.

26. Finally, plaintiffs' counsel asserts that most of the public school sites selected under the original 1986 Board of Education plan were no more than one City block from the private school and cites to ¶ 22 of the June 3, 1986 affidavit of Joseph Saccente (annexed to the Geller Decl. as Exhibit "A") in support of that assertion. The Saccente affidavit does not state that most of the offered

public school sites were less than a block from the private school, and my own recollection is that most of the offered public school sites were more distant. Indeed, documents provided to plaintiff's counsel in discovery in the related case of Committee for Public Education and Religious Liberty, et al. v. Secretary, United States Department of Education, et al., 88 Civ. 96 (JG), also pending before this Court, show that of the public school sites utilized for Chapter 1 services, only about 5% of the public school sites were less than a block from the private school, another 5% were one block from the private school, and 90% were further, with most being 1/4 to 3/4 of a mile away from the private school.

Conclusion

27. For the foregoing reasons, it is respectfully requested that the defendant Chancellor's motion for relief from the judgment be granted.

Dated: Brooklyn, New York
January 19, 1996

MARGARET O. WEISS

STATEMENT BY SECRETARY RILEY ON AGUILAR v. FELTON

In 1985, the Supreme Court held in Aguilar v. Felton that it is unconstitutional for public school personnel to provide instruction in religiously-affiliated private schools under Title I of the Elementary and Secondary Education Act. This decision has caused continuing problems in the Title I program for both public and private school children who need extra help. I therefore support reconsideration of the Felton decision in an appropriate case. In my opinion, Felton does not advance the progress of education or pass the test of good common sense. At a time when school budgets are under increased scrutiny, Felton places an additional undue burden on them.

The Felton decision has had a significant negative impact on Title I services for the neediest children in both public and private schools. Importantly, the costs of

compl. ıce with Felton are taken off the top of the school district's total Title I allocation, prior to providing funds for comparable instructional services for public and private school children. Therefore, compliance with Felton reduces the amount of Title I funds available for public school children, as well as private school children. Also, in the years immediately following the decision, there was a dramatic decrease in the number of private school children participating in the Title I program. Although the number has increased in subsequent years, the underlying problems caused by the Felton decision continue. Instead of having Title I services in their own school buildings, as public school children generally have, religious school children must go to another location to receive instruction from a teacher. This creates not only logistical problems, but significantly increases costs (for such things as transportation or the purchase or rental of

mobile vans) which adversely affects both public and private school children. I believe we must make more effective use of Title I dollars to support our neediest students in both public and private schools. Felton stands in the way of our doing so.

Based on a 1989 study by the General Accounting Office, we estimate that school districts have expended hundreds of millions of dollars on non-instructional costs in order to comply with Felton. For example, for the 1995-96 school year, New York City alone is budgeting $16 million for these costs. It is estimated that $10 million of this amount will come from a special Title I appropriation, but the remaining $6 million will have to come off the top of New York City' s regular Title I grant. This $6 million could be used to serve 5600 additional needy students in both public and private schools, or alternatively to improve services for the thousands of

children already being served under Title I in New York City. However, until Felton is reconsidered, New York City and other school districts must continue to comply with that decision.

As demonstrated by the facts of the original case, we believe that Title I services can be provided in private schools without aiding religion or creating excessive entanglement between government and religion. This Department has also supported and defended in litigation a variety of alternative arrangements for providing Title I services for private school children, including providing computer-assisted instruction in private schools and, in appropriate circumstances, parking mobile vans on or near private school property. There has been criticism, however, that even the alternative arrangements that have developed as a result of Felton are not the most educationally effective methods for providing Title I

services. In addition, the Felton decision at times has caused unnecessary tension between public and private school officials concerning how and where Title I services should be provided for private school children.

In light of these continuing problems, I support efforts to have the Felton decision reconsidered in an appropriate case.

CERTIFICATION OF COPY OF DEPARTMENT RECORD

Pursuant to the provisions of 20 U.S.C. 3485 and the authority vested in me by redelegation from the General Counsel, I hereby certify that the attached document entitled "STATEMENT BY SECRETARY RILEY ON AGUILAR v. FELTON" is a true and accurate copy of a document issued by the United States Secretary of Education on October 25, 1995.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Department of Education, on this 14th day of December 1995.

Philip Rosenfelt
Assistant General Counsel for
Elementary, Secondary, Adult
and Vocational Education

RESOLUTION OF THE BOARD OF EDUCATION

BD.ED.MTG Jun. 7, 1995

CAL. NO. 20-1

SUBSTITUTE RESOLUTION

June 7, 1995 Calendar, Item

AUTHORIZATION TO COMMENCE LEGAL PROCEEDINGS TO SEEK RELIEF FROM THE JUDGMENT IN AGUILAR v. FELTON

The following resolution is presented for adoption:

WHEREAS, for twenty years prior to 1986, the Board of Education provided required remedial educational and support services to economically and educationally disadvantaged students attending nonpublic religious schools on the premises of their religious schools in accordance with Chapter 1 of the Elementary and Secondary Education Act; and

WHEREAS, by decision dated July 1, 1985, in Aguilar v. Felton, 473 U.S. 402 (1985), the United States Supreme Court (by a vote of five for, and four opposed) held that it was a violation of the Establishment Clause of the First Amendment to the United States Constitution to have public school teachers and support staff provide such services on the premises of religious schools; and

WHEREAS, in response to such decision, the Board of Education thereafter developed an alternative program for providing the required Chapter 1 services to economically and educationally disadvantaged students attending nonpublic religious schools, which program includes the providing of services in leased mobile instructional units, in leased neutral sites, in public schools (which space is very limited), and through a system of interactive computer technology called computer assisted instruction; and

WHEREAS, the delivery of such services by these alternative methods has proven to be very expensive (for example, the annual leasing cost for each mobile instructional unit (which includes the services of a driver, garaging, maintenance repairs, insurance) is $106,934; the total current annual cost for leasing 126 units is $13,473,684; and the total annual cost for leasing 10 neutral sites which are presently used is $105,624) thereby significantly reducing the limited funds now available for providing needed Chapter 1 remedial services to both public school students and nonpublic school students; and

WHEREAS, since federal regulations require that non-instructional administrative costs for providing Chapter 1 services be taken "off the top" of the Board's total Chapter 1 allocation from the federal government (34 C.F.R. 200.52 (a)(2)), Chapter 1 funds may therefore only

be divided between public and private school students after these administrative expenses are deducted; and

WHEREAS, anticipated reductions in available funding to cover these service delivery costs means that in the future additional scarce resources will have to be diverted from providing needed remedial and support services to both public and nonpublic school students to cover these service delivery costs; and

WHEREAS, the Board of Education and the Chancellor also believe that it is educationally preferable to provide remedial and support services on the premises of students' regular schools, as is done for public school students, in that:

1) the use of mobile instructional units, neutral sites, and public school sites involves the loss of much needed regular classroom instructional time for

Chapter 1 students because of the time used to travel to offsite premises;

2) in the case of computer assisted instruction, there is no simultaneous face-to-face instruction by a teacher to support and reinforce the computerized instruction and

3) entitled Chapter 1 economically and educationally disadvantaged students in religious schools who are all performing below grade level in one or more subjects can ill afford such instructional time loss or other factors which negatively affect the delivery of services; and

WHEREAS, in 1994, in the United States Supreme Court's decision in Board Of Education of Kiryas Joel School District v. Grumet, 114 S.Ct. 2481 (1994), a majority of the Justices indicated that the Supreme Court should overrule or reconsider Aguilar v. Felton, supra; now, therefore be it

RESOLVED, that in light of the significant costs associated with the alternative service delivery methods now used which divert scarce funds from the provision of remedial services to both public and nonpublic school students, the educational superiority of on-premise services, and the opinion of several United States Supreme Court Justices that Aguilar v. Felton should be revisited, the Board of Education hereby authorizes the Corporation Counsel of the City of New York to take those steps necessary to commence legal proceedings, as soon as possible, seeking relief from the judgment in Aguilar v. Felton and, if necessary, reconsideration and overruling of the Supreme Court's holding in Aguilar v. Felton.

EXPLANATION

Chapter 1 requires the Board of Education to provide remedial and support services to eligible students attending nonpublic religious schools.

The Board of Education provided effective remedial and support services to Chapter 1 economically and educationally disadvantaged eligible students on the premises of their nonpublic religious- schools for twenty (20) years, without any proven evidence of entanglement between the religious school and the public school system; classrooms, materials, and staff were maintained separate and distinct from the educational program provided by the religious school.

Given that significant funds are required to be expended on the alternative methods now necessary because of the Aguilar v. Felton decision, thereby diverting scarce resources from eligible public and

nonpublic school students, as well as the loss of instructional time of students attending nonpublic religious schools, the Board and Chancellor believe it necessary to seek relief from the judgment in Aguilar v. Felton. Given the views expressed by a majority of the Justices in the Kirvas Joel case, there is a serious question whether Aguilar v. Felton commands the continuing support of a majority of the Court.

The Board and the Chancellor believe that the Chapter 1 program in New York City presents a proper and compelling case for the reconsideration of Aguilar v. Felton. Indeed, the Board and Chancellor believe it would be irresponsible in this time of national, state, and city fiscal crises not to take such action so as to ensure the best uses of scarce and diminishing educational resources.

(2) (3)

Supreme Court, U.S.
FILED
OCT 29 1996
CLERK

Nos. 96-552 and 96-553

In the Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

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22 pp

QUESTIONS PRESENTED

Whether the Court should reconsider its decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), and whether this case presents an appropriate occasion for doing so.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-552

RACHEL AGOSTINI, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

No. 96-553

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 11a-13a)[1] and the district court (*id.* at 1a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1996. The petitions for a writ of certiorari

[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 96-552.

were filed on October 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a federal program to provide remedial instruction and support services to needy elementary and secondary school students. See 20 U.S.C. 6301 *et seq.* To qualify for assistance under the "Title I" program,[2] a student must be failing, or at risk of failing, the State's student performance standards. The student must also reside within the attendance boundaries of a public school located in a low-income area. 20 U.S.C. 6313, 6315(b). Title I services must be provided "equitabl[y]" to all participating students, whether in public, religious, or secular private schools. See 20 U.S.C. 6321(a) and (d); 60 Fed. Reg. 34,800, 34,807-34,808 (July 3, 1995) (to be codified at 34 C.F.R. 200.10-200.11).[3]

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[2] The program at issue was originally known as "Title I," because it was first enacted as Title I of the Elementary and Secondary Education Act of 1965. In 1981, Congress enacted Chapter 1 of the Education Consolidation and Improvement Act, Pub. L. No. 97-35, Tit. V, Subtit. D, 95 Stat. 464, as a continuation of Title I, and the program became known as "Chapter 1." See *Aguilar* v. *Felton*, 473 U.S. 402, 404 n.1 (1985) (discussing the program's earlier history). In 1988, Congress enacted a new version of the program in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §§ 1003(a), 6303(a), 102 Stat. 293, 431. Effective July 1, 1995, the Chapter 1 program again became known as "Title I," pursuant to the Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3519. The most recent legislation made substantive changes in the program, but none of those changes substantially affects the issues in this case.

[3] See *Aguilar*, 473 U.S. at 404-405; *Pulido* v. *Cavazos*, 934 F.2d 912, 915 (8th Cir. 1991); *Barnes* v. *Cavazos*, 966 F.2d 1056,

Title I funds may be used only to supplement, and not to supplant, the students' regular classroom instruction. See 20 U.S.C. 6322(b). All Title I services provided to children in private schools must be "secular, neutral, and nonideological." 20 U.S.C. 6321(a)(2). When used for students in private schools, the funds may not be used to meet the "needs of the private school" itself, but only the needs of the students. 60 Fed. Reg. 34,808 (1995) (to be codified at 34 C.F.R. 200.12).

2. In 1978, six plaintiffs brought this action to challenge, as violative of the Establishment Clause of the First Amendment, the use of Title I funds to pay the salaries of public school teachers providing remedial instruction to students inside parochial schools. This Court held that such use of Title I funds did violate the Establishment Clause. *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

The Court noted that "[t]he professionals involved in the program are directed to avoid involvement with religious activities * * * and to bar religious materials in their classrooms," and that "the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols." 473 U.S. at 407. The Court concluded, nonetheless, that the public school system's supervisory efforts to ensure that the instruction retained a purely secular content "inevitably results in the excessive entanglement of church and state," *id.* at 409, because "[a]gents of the city must visit and inspect the religious school

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1059 (6th Cir. 1992); *Board of Educ. of Chicago* v. *Alexander*, 983 F.2d 745, 747-748 (7th Cir. 1992); *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1453 (9th Cir. 1995).

regularly, alert for the subtle or overt presence of religious matter in Title I classes," and "the religious school must obey these same agents when they make determinations as to what is and what is not a 'religious symbol' and thus off limits in a Title I classroom," *id.* at 413. The Court relied on previous "entanglement" decisions such as *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

On remand from this Court, the district court entered an injunction prohibiting the Secretary of Education and the Chancellor of the Board of Education of the City of New York from using public funds for any Title I program, to the extent that such use authorizes instructional and counseling services inside religious schools. Pet. App. 14a-16a. It is that injunction from which petitioners have sought relief under Rule 60(b) of the Federal Rules of Civil Procedure. See *id.* at A11-A12.

3. After this Court's decision in *Aguilar*, local school districts adjusted their practices in order to continue to provide Title I services to private school students, albeit in settings other than inside religious schools. School districts have provided Title I services in public school classrooms, in mobile units, at leased sites, and through computer-assisted instruction. The Secretary of Education has required that school districts pay for the administrative costs of such alternative delivery systems from their Title I funds before using any such funds for core instructional and counseling services.[4] See 60 Fed. Reg. 34,810 (1995) (to be codified at 34 C.F.R. 200.27(c)).

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[4] Both the alternative delivery methods and the Secretary's requirement that costs for compliance with the Court's decision

The economic costs of delivering Title I services to students enrolled in religious schools at sites other than the religious schools themselves are considerable. The Secretary of Education has expressed concern that school districts "have expended hundreds of millions of dollars on non-instructional costs in order to comply with [the Court's decision in *Aguilar*]," Pet. App. 18a, and that New York City was required in one fiscal year alone to spend $6 million on compliance that could otherwise have been used for the core instructional and counseling purposes of Title I, *ibid.* The Secretary has also noted that, although Title I services have been provided, since *Aguilar*, through "computer-assisted instruction in private schools and, in appropriate circumstances, parking mobile vans on or near private school property," *id.* at 18a-19a, there has been criticism that "even the alternative arrangements that have developed as a result of [*Aguilar*] are not the most educationally effective methods for providing Title I services," *id.* at 19a. The Secretary of Education has therefore stated that

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in *Aguilar* be paid for "off the top" of Title I funds have been upheld against several statutory and constitutional challenges. See *Pulido* v. *Cavazos*, 934 F.2d 912 (8th Cir. 1991); *Barnes* v. *Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Board of Educ. of Chicago* v. *Alexander*, 983 F.2d 745 (7th Cir. 1992); *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995). Many of the same practices upheld in the foregoing cases now exist in New York City, see 96-553 Pet. App. A43-A70, ¶¶ 24-77, and are currently under challenge in *Committee for Public Education and Religious Liberty (PEARL)* v. *Secretary, United States Department of Education*, No. 88-CV-0096 (JG) (E.D.N.Y.). On October 17, 1996, the district court in *PEARL* rejected the constitutional challenge to the Title I practices, but other issues are still pending.

he supports efforts to have the *Aguilar* decision reconsidered "in an appropriate case." *Ibid.*

4. In October and December 1995, petitioners filed motions pursuant to Federal Rule of Civil Procedure 60(b) for relief from the injunction entered by the district court on remand from this Court. The district court denied the motions. Pet. App. 1a-10a.

The district court first ruled that a Rule 60(b) motion was a proper mechanism for petitioners to present their request for relief from the September 1985 injunction. Pet. App. 7a-10a. The court acknowledged that "Rule 60(b) may not be used as a substitute for appeal," but it found it "plain" that, in this case, a Rule 60(b) motion "does not offend that rule." *Id.* at 7a. Then, after quoting the separate views of several Justices in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 114 S. Ct. 2481 (1994), regarding this Court's decision in *Aguilar* (discussed at page 10, *infra*), the court observed that "it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now." Pet. App. 7a-8a. In such extraordinary circumstances, the district court concluded, allowing petitioners "to resuscitate pursuant to Rule 60(b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done." *Id.* at 8a.

Addressing the "law of the case" doctrine, the district court noted that courts may depart from that rule for a "compelling reason" such as an "intervening change of law." Pet. App. 8a. The court thus accepted that, if petitioners were able to show "a sea change in the law" since this Court's decision in

Aguilar, the law-of-the-case doctrine would not preclude relief under Rule 60(b). *Ibid.* The court found further that the motion was not untimely, and that the plaintiffs who brought the original action would not suffer any cognizable prejudice as a result of any delay in bringing the Rule 60(b) motion. *Id.* at 8a-9a. And the court expressly found that a motion for relief from the injunction was "far preferable" to requiring the school district to challenge the judgment by placing itself in contempt by disobeying the injunction. *Id.* at 9a.

Ultimately, however, the court declined to afford petitioners relief from the judgment. The court observed that "[t]here may be good reason to conclude that *Aguilar*'s demise is imminent, but it has not yet occurred." Pet. App. 10a. The court also found it doubtful that it could properly anticipate any such decision by this Court to reverse its own decision in this case. *Ibid.* The district court suggested, however, that "there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision." *Ibid.*

The court of appeals affirmed, in a summary order, "substantially for the reasons" stated in the district court's decision. Pet. App. 13a.

ARGUMENT

1. a. In their petitions for a writ of certiorari, petitioners ask this Court to reconsider its decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), which held that public funds may not be used to pay for the salaries of teachers providing Title I services to students inside parochial schools, even when those services are

entirely secular in content and all religious symbols are removed from the classroom in which the services are provided. The Secretary of Education defended the constitutionality of such use of Title I funds in *Aguilar*, and he continues to believe that the decision in *Aguilar* was based on an incorrect interpretation of the Establishment Clause.

The Secretary also believes that the decision in *Aguilar* has had a significant, adverse impact on the provision of secular educational and counseling services to low-income students in need of remedial aid in both public and private schools. See Pet. App. 17a-19a. Hundreds of millions of dollars of Title I funds, which otherwise could have been used for instructional services, have been spent on administrative costs made necessary only because of the need to comply with *Aguilar*—by, for example, renting mobile instructional units and escorting students to and from instruction sites away from religious schools. There has also been substantial criticism of the efficacy of the alternative instructional mechanisms necessary for compliance with *Aguilar*, such as computer-assisted instruction and teaching in mobile units. *Id.* at 18a-19a.

b. Subsequent developments in the Court's Establishment Clause jurisprudence, particularly with respect to the "entanglement" prong of the Court's Establishment Clause test, create substantial doubt that the Court would decide *Aguilar* the same way if it were presented today with the question afresh. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Court rejected an "entanglement" challenge to the Adolescent Family Life Act (AFLA), 42 U.S.C. 300z *et seq.*, which provides for grants to public and nonprofit organizations, including organizations with religious affilia-

tions, for services relating to adolescent sexuality and pregnancy. The Court noted that the legislative history of AFLA expressed the view that the use of AFLA funds to promote religion was contrary to the intent of the legislation, and that the Secretary of Health and Human Services "police[d] the grants * * * to ensure that federal funds are not used for impermissible [sectarian] purposes." 487 U.S. at 614-615. The plaintiffs challenged the constitutionality of AFLA on grounds similar to those raised in *Aguilar*, namely, that the supervision of use of the grants created excessive entanglement of church and state.

The Court responded to that contention in *Kendrick* by observing that "this litigation presents us with yet another 'Catch-22' argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid. * * * For this and other reasons, the 'entanglement' prong * * * has been much criticized over the years." 487 U.S. at 615-616 (citing, *inter alia*, Justice O'Connor's dissenting opinion in *Aguilar*). But the Court found *Aguilar* distinguishable on the ground that AFLA required "less intrusive monitoring" of the day-to-day operations of the religious organization by the federal government. *Id.* at 616. At the same time the Court noted: "Unquestionably, the Secretary will review the programs set up and run by the AFLA grantees, and undoubtedly this will involve a review of, for example, the educational materials that a grantee proposes to use. The Secretary may also wish to have Government employees visit the clinics or offices where AFLA programs are being carried out to see whether they are in fact being administered in accordance with statutory and constitutional requirements." *Id.* at 616-617. Similarly, in *Zobrest* v.

Catalina Foothills School District, 509 U.S. 1 (1993), the Court rejected an Establishment Clause challenge to a school district's providing a sign language interpreter for a deaf student enrolled in a private religious school.

Since the Court's decisions in *Kendrick* and *Zobrest*, several Justices have expressed the view that *Aguilar* should be reconsidered. In his dissenting opinion in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 114 S. Ct. 2481 (1994), Justice Scalia, joined by the Chief Justice and Justice Thomas, stated that the Court's decision in *Aguilar* is "so hostile to our national tradition of accommodation [that it] should be overruled at the earliest opportunity." *Id.* at 2515. In her concurring opinion in *Kiryas Joel*, Justice O'Connor expressed the view that the provision of Title I instruction on the premises of private religious schools would be "entirely permissible" under the Constitution, and that the Court "should, in a proper case, be prepared to reconsider" *Aguilar*. *Id.* at 2498. Justice Kennedy stated, in his separate concurring opinion in *Kiryas Joel*, that the decision in *Aguilar* was "unfortunate" and "may have been erroneous," and that "it may be necessary for [the Court] to reconsider [it] at a later date." *Id.* at 2505.

2. As pointed out above, the Secretary of Education believes that *Aguilar* was incorrectly decided and should be reconsidered "in an appropriate case." Pet. App. 19a. That remains the position of the Secretary. The question then raised is whether this is an appropriate case for such reconsideration. Petitioners sought relief from the district court's judgment, entered pursuant to this Court's mandate, under Rule 60(b) of the Federal Rules of Civil Procedure, and

they now seek review of the court of appeals' affirmance of the district court's denial of that relief. Plainly, the district court was compelled to adhere to this Court's directly governing precedent in the same case. At least in the absence of an intervening decision of this Court specifically overruling *Aguilar*, the district court was bound both by *stare decisis* and by this Court's mandate to deny the requested relief. See *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425, 427-428 (1978) (per curiam) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)). It follows as well that the court of appeals was required to affirm the district court's order denying relief under Rule 60(b).

This Court, by contrast, does have the authority to overrule its own prior decision, even in the same case.[5] The Court has suggested, in referring to the law-of-the-case doctrine, that, with respect to its own decisions, prior rulings "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 446 (1992) (citation omitted). But the Court has also observed that, although the law of the case "directs a court's discretion, it does not limit the tribunal's power." *Arizona* v. *California*, 460 U.S. 605, 618 (1983); see *Wyoming* v. *Oklahoma*, 502 U.S. at 446 ("Of course, we surely have the power to accede to Oklahoma's request at this late date * * * to depart from our prior rulings."). We are not aware,

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[5] The Court has, for example, granted petitions for rehearing and, on rehearing, reversed its prior decisions. See *Reid* v. *Covert*, 354 U.S. 1 (1957); *Jones* v. *Opelika*, 319 U.S. 103 (1943) (per curiam).

however, of any instance in which the Court has reconsidered the merits of a prior decision in the same case in a procedural posture similar to this one, in which the case returned to this Court from a lower court, after entry of a final judgment on remand and denial of a motion for relief from that judgment.[6]

We recognize that several factors may counsel against reconsideration of the *Aguilar* decision in the same case. In addition to general concerns about *stare decisis*, with regard to relitigation in the same case the judicial system has a particularly strong interest in finality of litigation. "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent actions." *Arizona* v. *California*, 460 U.S. at 619 (quoting *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979)). Thus, although an appellate court (including this Court) has the power to reconsider its prior decisions, there is a policy, embodied in the law-of-the-case doctrine, against readily permitting parties to reopen litigation for the purpose of seeking reexamination of a legal ruling issued by an appellate court in the same case.

Those particular jurisprudential concerns would be lessened if a person other than the petitioners in this case commenced litigation intended to seek recon-

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[6] The *Arizona* v. *California* and *Wyoming* v. *Oklahoma* cases, discussed in the text, were original actions in this Court. In both cases, the Court adhered to its previous decision, but it also observed that "wholesale" extrapolation of the law-of-the-case doctrine into original actions was inappropriate. *Arizona*, 460 U.S. at 619; *Wyoming*, 502 U.S. at 446.

sideration of *Aguilar* by this Court. To be sure, *Aguilar* is a precedent of nationwide application and therefore binding on all lower courts under the doctrine of *stare decisis*. But other persons, including school districts other than that of the City of New York, that are not bound by the injunction issued by the district court on remand from this Court would not face the same problem of the law of the case presented in this case.

On the other hand, there are significant factors suggesting that the law-of-the-case doctrine should not prevent reconsideration of *Aguilar* in this case. That doctrine is not a rigid rule, and an appellate court may depart from its previous decision in light of changed circumstances, including intervening decisional law that would cause injustice by continued adherence to the prior ruling. Cf. *Arizona* v. *California*, 460 U.S. at 618 n.8. Thus, although the lower courts in this case were bound by this Court's mandate and its decision directly governing this case, this Court might well conclude that its subsequent decisions in *Kendrick* and *Zobrest*, followed by the separate opinions in *Kiryas Joel* regarding *Aguilar*, constitute sufficient intervening circumstances to warrant reconsideration of *Aguilar* here notwithstanding its status as the law of this case. Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 377 (1992) (district court denied Rule 60(b) motion because intervening decision "did not directly overrule any legal interpretation on which the [original order] was based"; court of appeals affirmed; this Court vacated and remanded); *System Federation No. 91* v. *Wright*, 364 U.S. 642, 650 n.6 (1961) ("There are many cases where a mere change in decisional law

has been held to justify modification of an outstanding injunction.").

In addition, there are no other cases available to present the issue of reconsideration of *Aguilar* in the foreseeable future.[7] Although other parties might be able to commence an action against the Secretary for the purpose of ultimately requesting this Court to reexamine *Aguilar*, that course would delay consideration of this significant issue and also would require considerable expenditure of judicial and other resources. And at least in the lower courts, that

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[7] There are no other cases squarely presenting the question in *Aguilar* of delivery of Title I remedial services to students inside private religious schools. But cf. *Helms* v. *Cody*, 856 F. Supp. 1102 (E.D. La. 1994) (holding that state program under which public school teachers provide special education inside parochial schools violates Establishment Clause; motion to reconsider under Federal Rule of Civil Procedure 59 still pending). The Secretary therefore has not had an opportunity to request this Court to reconsider *Aguilar* in any case applying *Aguilar* in related contexts. As we have pointed out above, there have been several challenges to the use of mobile classrooms to deliver services to students in private religious schools, and to the "off-the-top" method of allocating a school district's Title I funds. But in each case, the challenge was rejected (see pp. 4-5 n.4, *supra*, and cases cited), and in none of those cases did the losing plaintiff seek review in this Court. Hence, the federal government, which was a defendant in all of those cases, was never presented with an opportunity to suggest that the Court grant a petition for a writ of certiorari and, at the same time, reconsider its underlying decision in *Aguilar*. Nor does it appear that the federal government will be presented with such an opportunity in the near future. Compare, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435 (1987) (overruling *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), which imposed a "service connection" test for court-martial jurisdiction, in a subsequent case that initially involved only the application of the *O'Callahan* rule).

delay and expenditure necessarily would produce the same result that obtained below in this case, since even in the absence of any controlling law of the case, this Court's decision in *Aguilar* is controlling precedent that binds *all* lower courts. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").[8] The district court in this case compiled an extensive record when the case was previously litigated, and the City has updated the record with an extensive affidavit in support of its Rule 60(b) motion. See 96-553 Pet. App. A27-A101.[9]

Ultimately, the question of reconsidering the *Aguilar* decision in the same case is one of this Court's discretion and sound judicial administration, rather than its authority. We would not lightly suggest to the Court that it decline to follow its own law of the case. But in the unique circumstances of

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[8] The Secretary of course will continue to comply with the requirements of *Aguilar* in his administration of the Title I program. But because the Secretary supports reexamination of *Aguilar*, there would be a problem in a future case of identifying a nongovernmental defendant to a declaratory judgment action ready, willing, and able to undertake the cost of presenting a full defense against reconsideration of *Aguilar*, and of preparing a record to that end.

[9] If the Court deemed it necessary, the record could be supplemented further on remand, were this Court first to conclude that its prior decision in this case should not stand as an absolute barrier to renewed adjudication of the propriety of furnishing Title I services inside religious schools.

this case, we believe, on balance, that this is an appropriate occasion for reconsideration of *Aguilar*.

If the Court agrees, but has doubts regarding the appropriateness of doing so on certiorari to review the court of appeals' affirmance of the district court's denial of relief under Rule 60(b), we suggest that the Court could, either now or at a later date, also consider whether to treat the petitions for a writ of certiorari as petitions for rehearing of the Court's prior ruling in this case (see, *e.g.*, *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam) (granting successive petition for rehearing three years after prior denial of rehearing)) or as motions to recall and modify the Court's prior judgment (see, *e.g.*, *Cahill* v. *New York, N.H. & H.R.R.*, 351 U.S. 183 (1956) (per curiam) (granting motion to recall and amend the Court's judgment)). Compare *Citizens to Preserve Overton Park* v. *Volpe*, 400 U.S. 939 (1970) (treating application for a stay and opposition thereto as a petition for a writ of certiorari and opposition thereto, and granting certiorari).

In one way or another, we believe that this Court necessarily has the power to modify a prior judgment, such as *Aguilar*, that has continuing, prospective effect. Any questions that the Court may have concerning the appropriateness of alternative procedural mechanisms for that purpose may be addressed by the parties in their briefing on the merits if the Court grants the petitions for a writ of certiorari.

CONCLUSION

This Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), should be reconsidered and, we submit, overruled. If the Court agrees that this is an appropriate case in which to do so, the petitions for a writ of certiorari should be granted.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1996

RACHEL AGOSTINI, *et al.*,

Petitioners,

-and-

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

vs.

BETTY-LOUISE FELTON, *et al.*,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

1. Is there a compelling reason to grant the writs when there is no real substantive dispute before the Court, when petitioners seek a rehearing of an appeal determined eleven years ago in order to be able to reinstitute a program of remedial instruction and counseling of religous school students in place of the program that has been in operation during the eleven year interim without any effort on their part until now to obtain relief therefrom, and when their only reasons for seeking a rehearing at this time are; (a) a belief that they may be able to obtain a more favorable result; (b) a current unfunded cost of the program in operation that may only be temporary and that they have acknowledged to be relatively minimal; and (c) an alleged inconvenience arising from the fact that the instruction and counseling in the program in operation is provided mainly in classrooms in mobile units immediately outside of the religious school buildings instead of classrooms inside those buildings?

2. Are there grounds in the determination of this Court in the companion case to this case, involving programs the Court found to be "very similar" to the program in question herein, which may serve as additional grounds for upholding the prior determination herein, and in support of which respondents ought to be given the opportunity to develop a more current and adequate record than the eleven-year-old record on appeal herein, if there is to be a rehearing of that appeal?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were the following:

Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwatz, Robert H. Side and Allen H. Zelon, plaintiffs-appellees-cross-appellants;

Chancellor of the Board of Education of the City of New York and the Board of Education of the City School District of the City of New York, defendants-appellants-cross-appellees;

Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then, Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson. Cheryl Malcousu, Tonya Stevens and Rosemarie Vasques, defendants-intervenors-appellants-cross-appellees;

Secretary, United States Department of Education, defendant. (The Secretary did not appeal to the Court of Appeals, having declined to join in the motions of the other defendants and the defendants-intervenors in the District Court).

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Respondents, Betty-Louise Felton *et al.*, respectfully submit this brief in opposition to the petitions for a writ of certiorari that seek a rehearing of the prior determination of this Court in this case, *sub. nom., Aguilar v. Felton,* 473 U.S. 402 (1985).

STATEMENT OF THE CASE

A. Preliminary Statement

In *Aguilar,* eleven years ago, this Court held that a program or plan pursuant to which the Chancellor of the Board of Education of the City of New York and the Board of Education of that City provided instruction and counseling, by publicly-employed and paid teachers and counselors, on the premises of schools whose primary, if not only, reason for existence was their religious mission, violated the Establishment Clause of the First Amendment to the Constitution.

Since *Aguilar,* the Board of Education has developed a program, the "Alternative Plan," intended to avoid the aspects of the program invalidated in 1985. The Alternative Plan has withstood challenge in the United States District Court in the Eastern District of New York, and the features of the Plan, incorporated in the programs of other school districts, have withstood challenge in several Courts of Appeal.[1]

Although the Alternative Plan has been in operation for eleven years, petitioners insist that this Court in effect grant a rehearing of their appeal in *Aguilar* which would allow the

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1. *Walker v. San Francisco Unified Sch. Dist.,* 46 F.3d 1449 (9th Cir. 1995); *Board of Education v. Alexander,* 983 F.2d 745 (7th Cir. 1992); *Barnes v. Cavazos,* 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos,* 934 F.2d 912 (8th Cir. 1991); *Committee for Religious Liberty v. Secretary, United States Dep't of Education,* 88 Civ. 96 (JG) (E.D.N.Y.) (*"PEARL* case") (cross-motion dismissing plaintiffs' complaint granted 10/23/96).

Board of Education to re-institute the program invalidated therein. Their primary, if not only reason for doing so are comments of Justices of this court in *Board of Kiryas Joel School District v. Grumet,* 114 S. Ct. 2481 (1994) expressing dissatisfaction with the determination in *Aguilar* and a desire to reconsider that determination in a proper case. Secondarily, petitioners complain of the alleged financial and administrative burdens they claim are inherent in the Alternative Plan concerning which they sought no relief in any court until the comments in *Kiryas Joel.*

It is respondents' position that the alleged financial burdens of the Alternative Plan are self-imposed, perhaps temporary, and relatively minimal, that the alleged administrative burdens are virtually non-existent, and that, even were it otherwise, such considerations do not furnish a compelling reason for this Court to undertake reconsideration of the weighty constitutional issue or issues previously determined in *Aguilar* at this time and on the existing record.

Petitioners also insist that the sole ground for the prior determination in *Aguilar* was that the monitoring required to prevent the City's teachers and counselors from furthering the religious mission of the schools on the premises of which they performed their services would necessarily be so extreme as to result in "excessive entanglement" of church and state (City Pet., p. 10; Agostini Pet., p. 2.). In this respect, petitioners are not without impressive support in this Court *(see,* 473 U.S. at 426, O'Connor, J., dissenting). They assume, however, that the determination in *Aguilar* must stand or fall on the basis of the doctrine of "excessive entanglement" and virtually ignore in their petitions grounds which may prove to be stronger for allowing the determination in *Aguilar* to stand undisturbed.

Respondents believe that the basis of the determination in

Aguilar was broader than that provided by the doctrine of "excessive entanglement." We do not, however, stress that point. Although we by no means abandon the argument that a program that provides for the regular presence of publicly-employed and paid teachers and counselors on the premises of religious schools is sufficiently calculated, regardless of monitoring, to result in the furthering by the public employees, consciously or unconsciously, of the religious mission of the schools in which they perform their services, we submit that there may be even stronger grounds today, more than ever, for letting the determination in *Aguilar* stand.

Specifically, respondents rely on the determination and reasoning of this Court in *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), the case that was heard and decided at the same time as *Aguilar*, but in which the prevailing taxpayers had the foresight not to rely, as did respondents in *Aguilar*, solely on the doctrine of "excessive entanglement." Suffice it to say here that in *Ball*[2] this Court invalidated two programs instituted by a city school district which in his opinion for the Court in *Aguilar* Justice Brennan described as "very similar" to the program of the city school district in this case (473 U.S. at 409).

B. The Program in Question in *Aguilar*

In their briefs, petitioners emphasize the provisions of Title I which they describe at some length (City Pet., pp. 2-8; Agostini Pet., pp. 3-5). It is important, therefore, to note that respondents did not in this case prior to and including *Aguilar*, challenge the *statute* as violating the Establishment Clause; we challenged

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2. Respondents have been accustomed to referring to this case as *"Grand Rapids,"* as we have done in our cross-petition, but we shall refer to it as *"Ball"* herein because it appears to have been referred to as such in many, if not all, of the opinions from which we shall quote.

the original *program* placed in operation by the Chancellor and Board of Education on the premises of religious schools in New York City (hereinafter referred to as the "Original Plan").

The Original Plan differed considerably from the statute. Whereas the statute is general in scope in the sense that it refers to a disadvantaged class of students regardless of their school — *i.e.*, public or "non-public" — the Original Plan, for all practical purposes, covers students attending only one type of "non-public" school, the type which has as its primary, if not its only, reason for existence, a religious mission (hereinafter referred to as a "religious" school). It is an undisputed fact that virtually all of the students attending "non-public" schools who received Title I services under the Original Plan attended religious schools — to be precise, 21,906 out of 21,958, or 99.76% (A41). Of those students, 86% attended Roman Catholic parochial schools, and 8% attended Hebrew Day schools (A93).

Whereas the Title I statute is silent concerning where the statutory services are to be performed, the Original Plan provided that services for students attending participating religious schools were to be performed on the premises of their schools.

Whereas the statute is silent concerning the manner in which the statutory services are initially arranged to be made available to eligible students attending participating religious schools, the Original Plan left such arrangement to the absolute discretion of their schools. Accordingly, the statutory services were made available to the students of a religious school only if the school elected to participate in the Plan. Conversely, those services were not available, even to students eligible and desirous of receiving, or whose parents were desirous of their children receiving, such services if the religious school chose not to participate in the Plan (A119-120).

Whereas the statute expressly provides that the statutory services must not "supplant" those provided by the participating schools, the Original Plan provided instruction in reading, mathematics and English as a second language (A35), courses in which instruction was obviously provided in the participating religious schools. It may be that, without benefit of Title I teachers who, respondents will assume *arguendo*, are expert in bringing below-grade students up to grade, a religious school might have found that task difficult, but it could hardly in good conscience have evaded the responsibility or the effort. What the religious school teachers undoubtedly did prior to the Original Plan was to provide whatever extra assistance they could to their below-grade wards at the least expense to the latters' classmates.

In helping to bring below-grade students up to grade, moreover, the Original Plan did much more than to benefit those students. It greatly benefitted the entire religious school in that it not only relieved the school of an obligation it would have had with respect to those students, it also enabled the school to concentrate all of its resources on the rest of the student body.

Most importantly of all, the benefit the Original Plan thus conferred was by no means limited to the subjects of Title I instruction. The ability to read at a proper level and the ability to speak, read and write in English are the bedrock of learning so that the instruction received in those subjects aided the recipients in the instruction they received in every other subject in their school, religious as well as secular.

At this point it bears emphasizing that —

> . . . the secular education those [Roman Catholic parochial] schools provide goes hand in hand with the religious mission that is the only reason for their existence.

Lemon v. Kurzman, 403 U.S. 602, 616-17 (Brennan, J., concurring).

More recent, and perhaps even more direct authority is to be found in the following statement of Bishop Thomas V. Dailey in a pastoral letter issued to 1,500,000 parishioners in the Brooklyn Diocese, as quoted in *The New York Times* of December 1, 1993:

> The primary mission of the parochial schools remains "the teaching of the Catholic religion," the bishop said, responding to concerns that Catholic education has been losing its sense of purpose as nuns disappeared from the classrooms and the number of non-Catholic students increased.
>
> Each school will be mandated to develop a mission statement, which will include a statement of "Catholic Identity," Bishop Dailey said. That identity "is paramount," he said. *Without it, the Catholic school "has no reason for existence".*

(A110-111; respondents' italics).

A description of the Original Plan would not be complete without reference to a change in the Title I statute since *Aguilar* which will effect any re-institution of the Original Plan. That change allows Title I funds to be used by any participating school for "schoolwide programs" if —

> (i) the school serves an eligible school attendance area in which not less than 50 percent of the children are from low-income families; or

> (ii) no less that 50 percent of the children are from such families.

20 U.S.C. § 6314(a)(1)(B).

Under the foregoing provision, Title I funds may be used by a participating religious school to address the needs of the entire school. Some examples, provided by a representative of the Board of Education, are the hiring of a librarian, reducing class size, and buying computers. Declaration, dated June 8, 1995, of Michele I. Nowosad, Executive Director of the Division of Funded and External Programs of the Board of Education in *Committee for Public Education and Religious Liberty v. Secretary, United States Dept. of Education,* 88 Civ. 96 (JG) (E.D.N.Y.) *("PEARL* case").

C. The Alternative Plan

After *Aguilar,* the Board of Education was given one year within which to develop what has become the Alternative Plan (Agostini App., p. 14a, *et seq.).* Events in the course of its development serve to illustrate one of the substantial differences noted above between the Title I statute and the program placed in operation thereunder.

The initial plan, proposed by the Chancellor and Board of Education for the school year 1986-87, was one in which 80% of the religious schools that had participated in the Original Plan invalidated in *Aguilar* were offered space in "matching" public schools ("Public School Sites") (A120). Each such Public School Site was no more than 10 minutes away, on foot or by bus, from the religious school to which it was matched[3]. The

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3. These features of the initial Alternative Plan are set forth in the Fourth Monthly Report of the Chancellor to Judge Neaher, p. 9, par. 26, a copy of which was annexed to the affirmation of the respondents' attorney in (Cont'd)

City proponents of this initial plan considered it to be, and it unquestionably was, the least expensive method of complying, or attempting to comply, with the determination of this Court in *Aguilar* and the least challengeable thereunder (*Id.*).

Only 52 of the 194 religious schools to which the offer of matching Public School Sites was made saw fit to accept the offer, and the initial Alternative Plan died aborning (A47). Until the City proponents thereafter developed an Alternative Plan that was acceptable to the religious schools, the students of those schools, regardless of their eligibility to receive Title I services, went without them. In the school year 1986-87, therefore, in which the initial Alternative Plan was supposed to have been placed in operation, the number of religious school students who received Title I services was approximately 50% less than the number who had received such services in the prior year (*Id.*).

The Alternative Plan ultimately developed and placed in operation has four components, the most important of which, and most expensive, entails the use of mobile instructional units ("MIUs"), buses fitted out as classrooms and driven to, or in the immediate vicinity of, the entrance to the participating religious schools (A57). Each MIU, and at one point there were 128 of them (A58), is leased at a cost of $106,934, including the cost of maintenance and the services of the driver (A87).

The Alternative Plan also makes use of locations leased by the Board of Education ("Leased Sites"). The number of such sites, however, are relatively few compared to the number of MIUs (A61-62), and the cost of maintaining them is relatively insignificant compared to the cost of the MIUs (A84).

(Cont'd)
opposition to petitioners' Rule 60(b)(5) motions, but which was omitted from that affirmation as reproduced in the appendix of the City petitioners (A120).

The current Plan still makes use of some Public School Sites, but they are also few in number (A48-49, and the cost of using them is nominal (A84)).

The remaining component of the Plan is computer-assisted instruction ("CAI"), which is extensive (A68), but respondents do not know how costly because the Board of Education has only disclosed the administrative costs attendant upon the use of the computers (A84). The CAI program, moreover, is heavily dependent on the MIUs because, as the Board acknowledges, it is preferable for students to have some face-to-face interaction with teachers rather than to work on computers only (A69).

D. The Alleged Financial Burdens of the Alternative Plan.

By regulation promulgated shortly after *Aguilar,* the Secretary, United States Department of Education required non-instructional expenses for Title I services off the premises of religious schools, principally the cost of MIUs, to be taken "off-the-top" of Title I funds allocated to any local education agency, including the Board of Education of New York City, before the expenditure of such funds for Title I services to public and religious school students (34 C.F.R. § 200.52(a)(2)). The unfairness of such regulation to public school students, who would thereunder participate in paying for the delivery of Title I services to religious school students, apparently prompted Congress and the New York State Legislature to appropriate funds for the specific purpose of paying for the expenses in question. 20 U.S.C. § 2727(d); Chapter 683 of the Laws of New York of 1986, § 9; Chapter 53 of the Laws of New York.

Those special appropriations have fallen off. The State appropriations ceased after the school year 1990-91 (A82). The Federal appropriations were reduced by approximately 50% for the current school year of 1996-97 (*Id.*). As a result, under the

"off-the-top" regulation, the Board of Education is now required to take a substantial portion of the cost of MIUs "off-the-top" of its allocation of Title I funds and thereby to reduce the amount of such funds available for Title I services to its only true wards, the public school students of New York City.

Under these circumstances, it seems clear that the alleged burdens of the Alternative Plan have been only recently imposed by one defendant in this case, the Federal government, represented by the Secretary of its Department of Education, on its fellow defendants, the City defendants and the Agostini defendants-intervenors. It seems equally clear that, but for such action on the part of the Federal defendant, there would have been no financial burden involved in the Alternative Plan about which the City defendants or the Agostini defendants-intervenors would have complained in their Rule 60(b)(5) motions in the District Court or in their pending petitions in this Court.

More importantly, petitioners are being less than candid with this Court about the alleged financial burdens of the Alternative Plan. Elsewhere — specifically, in the *PEARL* case — the City defendants minimized the alleged financial burdens of the Alternative Plan, as follows:

> Nevertheless, even under a statistical analysis, *the New York City Board's expenditures for post-**Aguilar** delivery methods have been far from "excessive" or "disproportionate."* .... This is especially clear when those expenditures are compared to the Board's total Chapter 1 expenditures, as they must be.... *For example, in the school year 1987-88, the Board spent a total of $197,657,498 under Chapter 1 (including federal and, state capital expenses).... In*

> *the same year, the Board spent $7,917,102 for the noninstructional costs of post-Aguilar delivery methods — approximately 4% of the total.*

Gov't Defs. Memo. in Support of Cross-Motion for Summary Judgment, pp. 60-61; respondents' italics.

E. The Alleged Administrative Burdens of the Alternative Plan.

It bears repeating that the key component of the Alternative Plan is the MIU, a bus equipped as a classroom which, when operating as such, is parked in the immediate vicinity of the entrance to a participating religious school (A57). To attend a Title I class in an MIU, therefore, all that the students at a participating religious school must do is to pass through the front door of the school, walk a few steps, under the watchful eye of the MIU driver who acts as a guard, and pass through the MIU door. They then enter a handsomely outfitted classroom which can accommodate as many as fifteen students in addition to the Title I teacher, and has a partition that separates the classroom from a conference room in which the Title I counselor can perform his/her services or the Title I teacher can confer with his/her religious school counterpart or with a parent or parents of one of the students (A54).

Under such circumstances, it is more than questionable that it takes substantially more time for the students or teachers of a participating religious school to arrive at a Title I classroom in an MIU stationed immediately outside the door of the school building, or that it is substantially more inconvenient for them to participate in Title I activities in the MIU, than it was for them to arrive at a Title I class in a separate, and perhaps more distant, classroom inside the school building and to participate in Title I activities therein. In any event, it is more than

questionable that the time consumed in reaching the MIU is more than the ten minutes normally allotted as a recess between classes in any school.

- REASONS FOR DENYING THE WRIT

I.

PETITIONERS COME BEFORE THIS COURT THROUGH A PROCEDURE, APPROVED BY THE COURTS BELOW, THAT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CAUSE THIS COURT TO DENY THEIR PETITION AS AN EXERCISE OF THE COURT'S SUPERVISORY POWER.

This reason for denying the writ parallels the reason for respondents' seeking, by cross-petition, to have this Court review and renounce the procedure, purportedly under Rule 60(b)(5), followed by petitioners and approved by the courts below in this case. For their argument in support of this reason, therefore, respondents respectfully refer this Court to their cross-petition.

II.

THERE IS NO COMPELLING REASON FOR GRANTING THE WRIT.

The rules of this Court state that a petition for a writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. It has, in particular, been noted that the Court reviews issues that are "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955); 13 Moore's Federal Practice, § 810.21 at SC10-23 (2d ed. 1995).

It is respectfully submitted that the petitions under consideration present a single issue that is both "academic" and "episodic."

With respect to the academic nature of the issue presented by petitioners, respondents urge this Court to look once again at the single question presented by petitioners: "Whether the Court should reconsider its holding in *Aguilar v. Felton*. . . ." (City Pet., p. i); "Whether this Court should overrule its decision in *Aguilar v. Felton* . . ." (Agostini Pet., p. i). Such a question might be other than academic if it arose as a subsidiary question in a case in which there was a real dispute that depended upon the determination in *Aguilar*. Respondents respectfully submit that there is no such dispute before this Court at this time.

As set forth above, there is in place in New York City, a program pursuant to which Title I remedial instruction and counseling are being provided to students attending those religious schools in the City that have elected to participate in the program. It is now claimed, as the basis for this proceeding, that a less costly and more efficient program might be placed in operation if this Court were to hold that it would be permissible to conduct the program on the premises of the participating religious schools. There is, however, no real dispute between petitioners and respondents on comparative cost or efficiency *per se*. That has virtually been provoked by petitioners in order to present the question of the constitutionality of the on-premises program to this Court for a second time after an interim of eleven years.

Additionally, respondents respectfully question whether cost or efficiency should have any bearing on the issue of whether or not conduct of a government agency is constitutionally permissible. When this case was first before the Court of Appeals, which unanimously held the on-premises program to be invalid, that court, speaking through Judge Friendly, anticipated that an off-premises program would be

more costly and less efficient, and then held, on the basis of the precedents in this Court, that any such consideration was immaterial to the constitutional question in the case. 739 F.2d at 71-72.

The current unavailability of funds to cover the costs of MIUs without having those funds taken "off-the-top" also demonstrates the "episodic" nature of the issue petitioners present in this proceeding in their request for "relief" from the determination of this Court in *Aguilar.* For most of the eleven years that have elapsed since that determination, there have been sufficient special funds for that purpose. We are told that such funds might be "substantially reduced" for this school year (A82-83). For all anyone can tell, however, they may be available for the next school year, especially in light of the fact that the leaders of both major political parties have recently and vigorously championed an increase in the appropriation of Federal funds for educational purposes.

Lastly, but not least importantly, there is at least a serious question concerning the alleged costliness and inefficiency of the off-premises program when compared to the on-premises program. As noted above, the City petitioners have emphatically minimized the alleged costliness of the present off-premises program *(see,* pp. 10-11 above). As also noted above, their claim concerning the alleged inefficiency of the program relies heavily on the more than questionable inconvenience of using as classrooms MIUs parked outside the door of the participating religious schools instead of classrooms inside that door.

In sum, with a program in place that provides Title I services to the eligible students of participating religious schools, which has been in place for eleven years, and the features of which have withstood challenge concerning their constitutional validity in four Courts of Appeal and one District Court, it is respectfully submitted that there is no compelling reason for this Court to

grant the writ petitioners seek in order to consider or reconsider the constitutional validity of another program that is not truly in dispute and presents issues that are weighty, not easily resolved on any record, and not properly resolved on the existing record in this case.

III.

THE ISSUES THAT SHOULD BE RAISED AND RESOLVED IN ANY RECONSIDERATION OF *AGUILAR* AND THE PROGRAM THERE IN QUESTION INVOLVE CONSIDERABLY MORE THAN THE DOCTRINE OF "EXCESSIVE ENTANGLEMENT." THEY MAY NOT PROPERLY BE RESOLVED BY REFERENCE TO THAT DOCTRINE ALONE OR BY REFERENCE TO CASES OF AN ENTIRELY DIFFERENT FACT PATTERN, IF INDEED THEY MAY BE PROPERLY RESOLVED ON THE RECORD IN THIS CASE.

As indicated elsewhere, petitioners, principally the Agostini petitioners in this instance, are emphatic in stating that "[e]xcessive entanglement was the only ground for the decision in *Aguilar*" (Agostini Pet., p. 22). The same petitioners also assert that every part of the three-part test in *Lemon v. Kurzman*, 403 U.S. 602 (1971) has been "abandoned" (*Id.*). Respondents do not agree with either proposition, but we will not waste time, effort or space responding thereto at any length.

Suffice it to say in response to the first proposition that it is misleading, if not inaccurate. It may be that "excessive entanglement" might appear to be the only *stated* ground for the determination in *Aguilar*, but respondents respectfully submit that it is not the only ground on which that determination may be upheld, and it is in all likelihood the only stated ground because that ground was in turn based on the clear precedent in

Meek, a precedent acknowledged even by the dissenters in *Aguilar* (*see*, 473 U.S. at 427, O'Connor, J., dissenting).

Suffice it to say here in response to the proposition that the *Lemon* test or tests have been abandoned that such may well be irrelevant for present purposes, if not inaccurate. There will always have to be some test or tests for determining whether conduct violates the Establishment Clause, presumably based, pursuant to the common law tradition, on a precedent or chain of precedents in the form of decisions in prior cases involving a similar fact pattern.

As indicated at the beginning of this brief, respondents believe that the closest and controlling precedent in any reconsideration of *Aguilar* that might be undertaken by this Court is the determination of the Court in *Ball*, the case that was heard and decided at the same time as *Aguilar*. As the Court, speaking through Justice Brennan, noted in *Aguilar*, "The New York City programs challenged in this case are very similar to the programs we examined in *Ball*." 473 U.S. at 402.

This Court found it necessary to distinguish *Ball* in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). In doing so, the Court noted that the programs in *Ball* "in effect subsidize[d] the religious functions of the parochial school by taking over a substantial portion of their responsibility for teaching secular subjects." 509 U.S. at 12, quoting *verbatim* from Justice Brennan's opinion for the Court in *Ball*. 473 U.S. at 397. The Court also noted in *Zobrest* that the funding of the programs in *Ball*, in this instance together with the funding of programs in *Meek*, constituted "*direct grants of government aid* that relieved sectarian schools of costs they otherwise would have borne in educating their students." 509 U.S. at 12; respondents' italics.

On the other hand, as the Agostini petitioners point out, this Court noted in *Zobrest* that the assignment therein by a public school district of a sign-language interpreter to a *single* deaf-mute student attending a religious school was constitutionally permissible because it provided the school with only "an attenuated financial benefit." 509 U.S. at 12.

Because of the Court's comments in *Zobrest,* and because the Agostini petitioners rely heavily on that case as one in which the Court "upheld the delivery of generally available services to parochial school students" (Agostini Pet., p. 16), presumably comparable to the delivery of services under the Original (Title I) Plan in *Aguilar,* respondents believe a comparison of the services in *Aguilar* with those in *Ball* and *Zobrest* is in order.

As respondents have noted above, the Title I program in *Aguilar,* by providing instruction in reading, mathematics and English clearly "[took] over a substantial portion of [the participating religious school's] responsibility of teaching secular subjects." As also noted above, there is scant validity in the argument (which petitioners have never supported with other than references to the wording of the Title I statute and conclusory statements repeating such wording) that, presumably because of the remedial nature of the instruction in *Aguilar,* it did not "supplant" any instruction the religious school had previously provided. Any such argument hardly serves to overcome the fact that the school previously had, and had undoubtedly previously assumed, the responsibility, as best it could, of bringing its below-grade students up to grade in such basic subjects as reading, mathematics and English. By any objective standard, therefore, the Title I program in *Aguilar* far more closely resembles the programs in *Ball* than it does the provision of a sign-language interpreter to a single deaf-mute student in *Zobrest.*

At this point, it bears noting that, despite the fact that the record in *Aguilar* was developed by the plaintiffs on the strength of *Meek* and the doctrine of "excessive entanglement," Justice Powell, who hardly qualified as a doctrinaire supporter of the principle of separation of church and state, and whose vote in *Aguilar* was hardly assured until cast (but in the opinion of all concerned was decisive), saw enough in the record to state the following:

> As has been discussed thoroughly in *Ball, ante*, at 392-397, with respect to the Grand Rapids programs, *the type of aid provided in New York by the Title I program amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require.*

473 U.S. at 402. Powell, J., concurring; respondents' italics.

The Agostini petitioners venture to distinguish the programs in *Ball* from the program in *Aguilar* by noting that the programs in *Ball* were "provided to *all* of the students in the nonpublic schools" and that "[a]pproximately ten percent of any given nonpublic school student's time during the academic year would consist of [the state-sponsored instruction]" (Agostini Pet., p. 16, n. 11; petitioners' italics). Even if it is assumed that this quantification provides a meaningful distinction, it bears repeating that under any re-instituted Title I program on the premises of religious schools — which is what petitioners are seeking in this proceeding — Title I funds will in fact be available for the benefit of *all* of the students of the religious school in the form of "schoolwide programs." With respect to the student hours spent in the Title I program in *Aguilar*, the record in this case, for the reason respondents have repeatedly indicated, is

blank, and it is but another reason why that record is inadequate for any reconsideration of *Aguilar* at this time.

Before leaving *Ball*, respondents respectfully call this Court's attention to another grounds for the determination of the Court in that case which is particularly applicable to *Aguilar* — *i.e.*, "the symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings [which] threatens to convey a message of state support for religion to students and the general public." 473 U.S. at 397.

In his opinion on behalf of the Court in *Ball*, Justice Brennan provided the following as a prime example of this symbolic union:

> Under the City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use the same classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public.

473 U.S. at 392.

The significant part of the foregoing passage for present purposes is that it is a description, not of the programs in *Ball*, but of the Title I program in *Aguilar*, taken from the opinion of Judge Friendly on behalf of the unanimous Court of Appeals when this case was first in that Court. 787 F.2d at 67-68.

The one case other than *Zobrest* on which petitioners rely heavily, *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1966) is wholly inapposite on its facts. *Rosenberger* did not involve anything resembling the type of programs in *Ball* and *Aguilar*. Rather, it involved the use of a fund, created by a state university to make payments for the printing costs of publications of student groups, in order to make a payment for the printing costs of a publication of a student group organized to promote a particular religious belief.

Rosenberger was decided on the ground that the denial of funding to that particular student group was a denial of the free speech guarantee of the First Amendment which was not compelled by the Establishment Clause. In so holding, the Court expressly distinguished direct money payments to sectarian institutions (115 S. Ct. 2523) (to which this Court in *Zobrest* had likened the funding of the programs in *Ball*), and there was no question of the subsidization of the religious mission of sectarian schools by the taking over of their responsibility for teaching secular subjects.

Petitioners extract from the opinion of this Court in *Rosenberger* and in the few other cases they cite the "neutrality concept" which they then seek to apply to the Title I program in *Aguilar*, as if that concept excuses the subsidization of the religious mission of sectarian schools or the effect of the appearance of a joint enterprise of church and state on the students of those schools and the general public. Any such application of the "neutrality concept," however, would permit the circumvention of the line of cases cited in *Rosenberger* as prohibiting direct payments to religious schools simply by providing for similar payments to be made to nonreligious schools. 115 S. Ct. 2523.

The "neutrality" on which petitioners rely to save the

program in this case might appear on the face of the Title I *statute*. It did not exist in the Title I *program* that was in operation with respect to "non-public" schools prior to *Aguilar*. As noted above, no less than 99.97% of the students in the schools that participated in that program attended religious schools.[4] It bears repeating, moreover, that, unlike the student of a religious school who is aided by a policeman or fireman, or who boards a public bus free of charge on his/her own, or who obtains the aid of a sign-language interpreter or other assistant on his/her parents' application, the religious school students in the Title I program in operation prior to *Aguilar* received Title I services only if their school elected to participate in the program, and even then only through arrangements made by the school. In the latter situation, it is inconceivable that the students receiving Title I services did not see them as coming through the good auspices of the religious school or, as unfortunately for present purposes, through a joint effort of the religious school and some government agency.

Before concluding this point, respondents respectfully point out that, because of the lack of an adequate record, we have attempted to do little more than to establish that there are creditable grounds other than, or in addition to, the doctrine of "excessive entanglement" on the basis of which this Court might let its determination in *Aguilar* stand. If, therefore, the Court wishes to reconsider that determination in this proceeding, we respectfully repeat the request made in our cross-petition that the Court remand this case to the District Court for a plenary hearing in which we will have the opportunity to develop an adequate record in support of those additional grounds, with leave to petitioners to renew their petition for a writ of certiorari

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4. In any event, the analysis of this Court of a statute "does not end with the text of the statute. . . ." *Kiryas Joel*, 114 S. Ct. at 2489.

upon the completion of that hearing and without further decision of the District Court or the Court of Appeals.

CONCLUSION

It is respectfully submitted that the petitions for a writ of certiorari should be denied.

Alternatively, if this Court wishes to reconsider its prior determination in this case in this proceeding, it is respectfully submitted that the Court should remand the case to the District Court with instructions to conduct a plenary hearing, including full discovery and any trial necessary to resolve questions of fact, concerning the issues raised by allowing Title I services to be re-instituted on the premises of the religious schools of New York City, with leave to petitioners to renew their petitions for a writ of certiorari in this Court upon the completion of such proceeding without further decision of the District Court or the Court of Appeals. It is further respectfully submitted that the instructions to the District Court should provide that, at the commencement of the proceeding therein, the Board of Education shall present the Title I program or plan it intends to institute on the premises of the religious schools should this Court permit it to do so.

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Nos. 96-552, 96-553

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RACHEL AGOSTINI, ET AL.,
Petitioners,

v.

BETTY-LOUISE FELTON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Respondents appear to agree that the petitions in these cases present an important question, one that has in fact been raised by a majority of the Members of this Court: whether *Aguilar v. Felton*, 473 U.S. 402 (1985), should be overruled. Respondents argue, however, that the parties most directly affected by that decision cannot raise the question — either because they are the wrong parties to do so, or because there is something inadequate about the record that they bring to this Court. These procedural objections are insubstantial.

ARGUMENT

I. RESPONDENTS OFFER NO REASON WHY *AGUILAR v. FELTON* SHOULD NOT BE OVERRULED.

The most striking feature of the Respondents' Brief in Opposition is that it makes no attempt to defend the reasoning in *Aguilar v. Felton*, 473 U.S. 402 (1985) — that the monitoring of Title I teachers on the premises of church-related schools "inevitably results in the excessive entanglement of Church and State." *Id.* at 409. Respondents do not argue that the "excessive entanglement" prong of *Lemon* has any continuing vitality, much less that it was correctly applied in *Aguilar*. Implicitly, they recognize that *Aguilar* cannot stand on the terms on which it was decided.

Respondents argue, however, that there are "creditable grounds other than, or in addition to, the doctrine of 'excessive entanglement' on the basis of which this Court *might* let its determination in *Aguilar* stand." Respondents' Brief in Opposition ("Br. Opp.") 21 (emphasis added). Petitioners agree that is a question worthy of the Court's attention, but the answer is supplied by the cases discussed in Section I.B. of the Petition. Those cases establish that the Establishment Clause is not offended when a limited form of secular instruction is provided on an equal basis to all eligible students, regardless of their religion and regardless of where they attend school. Establishment Clause problems may arise when "direct grants of government aid . . . relieve[] sectarian schools of costs they otherwise would have borne in educating their students," or when a government program "in effect subsidizes the religious functions of the parochial schools by taking over a

substantial portion of their responsibility for teaching secular subjects." *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12 (1993). But that is not the case here. No funds or materials are provided directly to the schools, and by providing limited remedial instruction to a small fraction of the students in a particular school the government can hardly be said to be "taking over a substantial portion of [the schools'] responsibility for teaching secular subjects." *Id.*

II. THIS CASE PRESENTS A FULLY DEVELOPED RECORD AND A GENUINE CONTROVERSY.

Respondents suggest that the record is somehow inadequate to permit the Court to address the "other" grounds upon which the Court "might" let *Aguilar* stand. Br. Opp. 21. But the respondents have had two opportunities to develop the record: first, when the original record in *Aguilar* was created; and second, when the Rule 60(b) motions were filed in the district court. Both sides submitted whatever factual information they thought was relevant before the initial decision, and both sides submitted additional material to the district court in support of, or opposition to, the Rule 60(b) motion. The record was fully adequate to decide the case in 1985, and the supplemental record is fully adequate today.

Respondents raise only two questions about the record. First, they question whether Title I services in fact "supplant" instruction that was provided by the church-related schools. If that were the case, Title I itself would be violated. *See* 20 U.S.C. § 6322(b); 34 C.F.R. § 200.12(a). But the record establishes beyond dispute that it is not the case. The original record in *Aguilar* contained affidavits from the responsible educational officials of the Archdiocese of New York and the Diocese of Brooklyn, and the Rule

60(b) motions were supported by supplemental affidavits from those officials. Those affidavits made clear that the Catholic schools in New York and Brooklyn did not offer the types of services that are available under Title I, and that Title I did not replace any of those schools' educational offerings.[1] That evidence has never been controverted.

Second, respondents suggest that the Title I program has changed since *Aguilar* was decided, and that the program will never be reinstituted in its original form even if *Aguilar* is overruled. These suggestions are baseless, as the record clearly shows. The City submitted a lengthy affidavit with its Rule 60(b) motion. That affidavit stated that "the basic educational composition of [Title I] services for private school students, as provided by the Board of Education, has remained essentially unchanged, from [Title I's] inception in 1965 until today." Declaration of Margaret O. Weiss ¶ 12 (Oct. 16, 1996). Those services consist of remedial instruction and clinical and guidance and support services, which are made available only to students who meet the statutory eligibility requirements. *Id.* ¶¶ 12-13. The only change that has taken place, the City's affidavit made clear, was that as a result of the decision in *Aguilar* services are no longer provided on the premises of church-related schools. *Id.* ¶ 15. The affidavit proceeds to describe the alternative methods that were adopted, and to explain why the City sought to return to "the in-school delivery of [Title I] services which was used for private school students prior to the judgment" in *Aguilar*. *Id.* ¶ 78. In short, the record is clear that the City, joined by the defendant-intervenors and

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[1] *See* Affidavit of Reverend Vincent D. Breen (May 30, 1995) ¶ 6 (attaching Affidavit of Reverend Vincent D. Breen (March 22, 1979) ¶ 6); Affidavit of Catherine Hickey (May 31, 1995) ¶ 6 (attaching Affidavit of Reverend Monsignor John J. Healy (March 22, 1979) ¶ 6.

now by the federal government, seeks to be relieved from the judgment precisely so that it can reintroduce the same on-premises services that were at issue in *Aguilar*.

Respondents raise the specter of new *schoolwide* programs' being offered for the benefit of all students in a religious school, presumably in place of the programs that are presently being offered to a limited number of eligible students. But that is a red herring. Department of Education policy expressly provides that "schoolwide programs may not be operated in private schools." Title I, Part A, Policy Guidance, U.S. Department of Education (April 1996) 13.[2] That policy is consistent with the Title I regulations, which provide that Title I funds may not be used to meet the "needs of the private school." 34 C.F.R. § 200.12(b). Thus, there is no issue of schoolwide programs in this case. This case concerns only the provision of limited remedial and counseling services to schoolchildren who meet the statutory eligibility criteria of economic and educational deprivation.

Respondents also imply that the Board may decide in the future to change the method of Title instruction from the present "pull-out" method, in which students are pulled out of their regular class for remedial instruction, to a "push-in" method, in which the Title I teacher joins the regular classroom teacher in providing instruction to the entire class. This is another red herring. There is nothing in the record to suggest that the "push-in" method is being contemplated for use in the nonpublic schools. The affidavit to which

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[2] There is nothing new about the statutory authorization of schoolwide programs. It has been in existence since 1978, long before *Aguilar* was decided. *See* Pub. L. No. 95-561, § 133, 92 Stat. 2176. But schoolwide programs have never been authorized in nonpublic schools.

respondents cite was submitted in another case to explain how services are provided in some *public* schools. There has never been a suggestion that the "push-in" method might be offered in the nonpublic schools, and there is certainly no such issue before the Court.

In sum, there is no uncertainty about the nature of the services that the Board proposes to offer — or the setting in which they will be offered — if relief is granted from the injunction under which the Board now operates. All of the petitioners, joined now by the federal government, seek relief from the judgment precisely so that the same remedial and counseling services that were at issue in *Aguilar* may be offered in the same on-premises setting in which they were offered prior to *Aguilar*.

It is astonishing that respondents could seriously maintain that the dispute over whether that relief should be granted is "academic," and that there is no "real dispute that depend[s] upon the determination in *Aguilar*." Br. Opp. 13. Nothing could be further from the truth. As a direct result of "the determination in *Aguilar*," *id.*, there is a continuing injunction in effect that prevents the government defendants from providing services to the intervenor-defendants' children under the conditions that all the defendants maintain are most efficient and beneficial. As the affidavit submitted by the City of New York in support of its Rule 60(b) motion makes clear, it is only because of this continuing injunction that Title I services are not offered on the premises of church-related schools in New York City. The dispute is a very real one, the contours of which are clearly defined by the record in this case.

III. THERE IS NOTHING UNUSUAL OR IMPROPER ABOUT THE PROCEDURE BY WHICH THE PETITIONERS SOUGHT RELIEF FROM THE JUDGMENT.

In their Cross-Petition and Part I of their Brief in Opposition, respondents insist that the law affords no procedure by which the parties in *Aguilar* can seek relief from the judgment, no matter how inconsistent that judgment may be with subsequent pronouncements of this Court and no matter how burdensome the judgment has become. Respondents maintain that the parties are "stuck" with *Aguilar* and its continuing effects until *someone else* persuades the Court in a *different* case that *Aguilar* should be overruled. But if reconsideration of *Aguilar* is warranted by subsequent developments in the law, then surely the parties who are subject to the continuing injunction mandated by *Aguilar* are appropriate parties to seek it. They cannot do so through a separate suit for a declaratory judgment: absent a modification of the judgment in this case, the principle of *res judicata* would bar a separate suit. These parties, therefore, have no choice but to seek a modification of the judgment if they wish to be relieved of its burdens.

There is no question that the federal courts have power to grant the requested relief. The federal courts have inherent power, reinforced by Rule 60(b), to entertain a request that a continuing injunction should be modified or vacated. *See, e.g., United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

The available grounds for such relief include that "it is no longer equitable that the judgment should have prospective application" or "any other reason justifying relief from the operation of the judgment." These grounds

necessarily include a meritorious argument that the law has been changed or that, in light of other developments, it should be changed. *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992); *System Federation No. 91 v. Wright*, 364 U.S. 642, 647, 650 n.6 (1961).

In this case, the grounds for relief are not simply that the law should be changed, but that the law in material respects has changed. In particular, as explained in the petition, the "excessive entanglement" prong upon which *Aguilar* was based appears to have been abandoned, and the principle of neutrality has since been applied in a way that appears to foreclose any other rationale for the result in *Aguilar*. In short, *Aguilar* itself has not been overruled — any more than any judgment that is the subject of a Rule 60(b) motion has been vacated before the motion is made — but the legal principles upon which it rests have been changed. And that is a classic basis upon which to seek relief from a judgment.

That this case was decided last time at the Supreme Court level does not deprive the parties of the right they would otherwise have to seek relief from a continuing injunction. In *Standard Oil Co. v. United States*, 429 U.S. 17 (1976), this Court expressly held that a district court may entertain a Rule 60(b) motion to vacate an injunction that had been previously affirmed by this Court. In that case, the Court expressly abandoned the requirement, which it had previously imposed, that appellate leave be obtained before a district court can reopen a case previously decided by this Court.

Whatever court decided the case on the merits eleven years ago, the parties have the ability under extraordinary circumstances to seek relief from its continuing effect. And

when a majority of this Court has indicated that the decision may have been wrong and should be reconsidered, it would be strange indeed to say that the parties whose actions are restrained by that decision cannot secure the reconsideration that has been invited.

To be sure, the district court may have been constrained to deny the Rule 60(b) motion in the absence of a decision by this Court explicitly overruling *Aguilar*. But that is no impediment to this Court's granting the petition and entertaining the argument on the merits that *Aguilar* should be overruled. Anytime a litigant sets out to secure the explicit overruling of one of this Court's precedents, the district court and the court of appeals may feel restrained by precedent to rule against him.[3] But then this Court can decide whether the time has come to revisit the precedent and overrule it. To be sure, principles of *stare decisis* or, in this case, law of the case may constrain even this Court. But neither of these principles is absolute,[4] and both must

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[3] Thus, if someone other than a party to this case were to question the continued vitality of *Aguilar*, he would face essentially the same barrier that these parties face. The district court and the court of appeals would almost certainly feel bound by *Aguilar* as a precedent, just as much as the courts below felt bound.

[4] There is nothing about the law-of-the-case doctrine that precludes relief in this case. "Law of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618 (1983). Law of the case is "not an inviolate rule" and "merely expresses the general practice of refusing to reopen what has been decided." *United States v. Melendez-Carrion*, 820 F.2d 56, 60 n.1 (2d Cir. 1987). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." *DiLaura v. Power Authority.*, 982 F.2d 73, 76 (2d Cir. 1992) (quotation and citations omitted).

necessarily accommodate intervening decisions and doctrinal developments that cast doubt on the earlier decision.

Granting the petition and entertaining the request for reconsideration of *Aguilar* would not open the floodgates to repetitive requests for reconsideration of the Court's decisions. It is an extraordinary case in which the correctness of a continuing injunction has been called into question by a majority of this Court, and entertaining a petition in such a case will hardly encourage other litigants to file insubstantial Rule 60(b) motions and seek review upon their denial. If it does, this Court has previously expressed its "confidence in the ability of the district courts to recognize frivolous rule 60(b) motions." *Standard Oil Co. v. United States*, 429 U.S. at 19.

In sum, there is no reason why this Court cannot or should not reconsider its decision in *Aguilar* in this, the same case. The question, petitioners respectfully submit, is how the Court, a majority of whose members have invited *Aguilar's* reconsideration, can avoiding reconsidering it when the parties most directly affected by the decision are properly before the Court requesting reconsideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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No. 96-553

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK et ano.,

Petitioner,

- against -

BETTY LOUISE FELTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF

This brief is submitted in reply to the brief submitted in opposition to our petition by respondents Betty Louise Felton, et al. It is submitted that nothing in respondents' submission indicates that the Court should not review the order of the Court of Appeals, but indeed underscores the propriety of plenary review by this Court.

(1)

Respondents urge that the writ should be denied because the matter is being presented to the Court through an inappropriate procedure. Resp. Br., p. 12. The Respondents incorporate by reference a more fully developed argument made in their cross-petition. As we believe the argument is properly raised in opposition to our petition, we address it here.

It is our position that we properly sought relief from the District Court's 1985 judgment which contains an

injunction effectuating the holding of the Court in Aguilar v. Felton, 473 U.S. 402 (1985). App., pp. A22-26. In light of the unique circumstance that a majority of the Court has stated that they wished to reconsider the holding in Aguilar, see Board of Education of Kiryas Joel v. Grumet, __ U.S. __, 114 S. Ct. 2481, at 2418, 2505, 2515 (1994), it is submitted that a Rule 60(b) motion is appropriate; that rule specifically provides for relief from a judgment when "it is no longer equitable that the judgment have prospective application." F.R.C.P. 60(b)(5). Such judicial authority is particularly appropriate for institutional litigation such as here, where a significant change in circumstances has occurred. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383-84 (1992)(consent decree). It is submitted that such changed circumstances are present here.

Respondents' "floodgates" argument that the granting of relief to petitioners will result in a rash of 60(b)

motions in cases where this Court has decided an issue by a vote of 5 to 4 simply raises false fears. This is not an ordinary case, finally resolving a private dispute. Rather, it involves a judgment which, absent modification, would for all time control the manner in which a public institution may provide services authorized by Congress, on a dubious constitutional principle. Furthermore, the suggestion that the issue should await resolution in some other litigation would lead to an absurd result. The petitioners' school district is the largest in the Title 1 program, and the City of New York has substantial parochial school systems with large numbers of children eligible for Title 1 services. The record of its past and present manner of delivering Title 1 services to parochial school students would provide the best backdrop for reconsideration of Aguilar. In any event, as noted by the Secretary of Education, another case raising the issue seems well off in the future. For example, in

Helms v. Cody, 856 F.Supp. 1102 (E.D. La., 1994), as of the date of this brief a motion for reconsideration remains pending in the District Court.

Assuming that the Court believes there is some question as to whether the petitioners followed the proper procedure, we submit that this should not result in a denial of our petition, but rather the Court should require full briefing of the issue on the merits.

(2)

Respondents present no convincing reason why the Court should not reconsider the holding in Aguilar, especially where a majority of the Court has already indicated their desire for such reconsideration. Indeed respondents apparently feel constrained not to defend the holding in Aguilar, but focus on the holding in the companion case of School District of Grand Rapids v. Ball, 473 U.S. 373 (1985). Resp. Br. in Opp., pp. 16-20.

While reconsideration of Aguilar would necessarily encompass a reconsideration of Grand Rapids, at least one of the state programs at issue in that case was factually and legally distinct from the Title 1 program involved in Aguilar. Grand Rapids, pp. 398-400 (O'Connor concurring as to invalidation of Grand Rapids' "Community Education" program). Respondents' reliance on that case merely confirms the need for reconsideration of both cases.

Respondents do raise some factual assertions concerning the Title 1 program in New York to which we must specifically reply. They point to 20 U.S.C. § 6314(B) which authorizes the use of federal funds for school-wide programs. This is not a new part of the Title 1 program, as respondents appear to assert, since Congress has specifically authorized such school-wide programs since 1978, prior to Aguilar. See, P.L. 95-561, § 133, 92 Stat. 2176. In any event, such optional programs have been used

by a number of public schools in New York City, but they have never been used as a method of providing Title 1 services to parochial school students. The Nowasad Declaration cited by Respondents (Resp. Br. in Opp., p. 7) was speaking only of the use of such programs by public schools. Similarly the reference in the Nowasad Declaration to a "push-in" method of providing Title 1 services referred only to its use in public schools. Cross-Petition, pp. 24-25.

Respondents also belittle the financial burden of complying with Aguilar. As we informed the Court in our petition, for 1995/96, almost six million dollars, which might otherwise provide pedagogical services for all the City's eligible students, were taken "off-the-top" to comply with Aguilar. Respondents' assertion that this is a mere "episodic" loss of special funding misses the mark. Respondents fail to appreciate that in a time of scarce

governmental resources, it is an unwise use of such resources to provide inferior educational services, all to comply with the dubious constitutional mandates of Aguilar. Furthermore, we have never "minimized" the financial burden of complying with Aguilar. Resp. Br. in Opp., p. 19. Rather, in an action in the District Court attacking the constitutionality of the Board's present Title 1 program, in which Respondents' counsel was lead counsel, plaintiffs urged that the petitioner was violating the Establishment Clause by financially favoring parochial over public school students. Committee for Public Education and Religious Liberty v. Secretary, United States Department of Education, 88 Civ. 96 (E.D.N.Y.) ("the Pearl litigation"). The cited language (Resp. Br., p. 10), a response to the plaintiffs' statistical analysis, was merely an attempt to show that the cost of complying with Aguilar was

proportionately a small part of the entire Title 1 program in New York City.

Respondents also appear to find some constitutional relevance in the fact that almost all the non-public schools in which students receive Title 1 assistance are religiously-affiliated schools. Brief in Opp., p. 21. Respondents fail to inform the Court that many of those students are not of the same religious faith as the schools they attend; in some of New York City's Catholic schools attended by students receiving Title 1 services, the percentage of student enrollment that is non-Catholic ranges from 50% to 85%. Joint Appendix to Court of Appeals, p. A553. Students receive Title 1 assistance because of their economic and educational disadvantages, not because of the religious nature of the schools they attend.

(3)

Respondents do not convincingly show that the subject litigation is an inappropriate vehicle for reconsideration of Aguilar. Rather, it provides the best vehicle for such reconsideration. The record contains both the Joint Appendix in Aguilar, which lays out the Board's substantial experience in providing on-site services, and extensive factual material as to the operation of the post-. Aguilar, off-site program. Respondents' claim that the record is inadequate and that there should be a remand for a further hearing is a mere attempt at delay. In the Pearl litigation, to which Respondents' counsel makes frequent reference (Resp. Br. in Opp., pp. 1, 7; Cross-Petition, pp. 4, 14, 24), a constitutional attack was brought against the present program of providing Title 1 Services in New York. In that action, Respondents' counsel was given broad discovery as to the operation of the Board's Program. In

submitting an affirmation with attached exhibits on our 60(b) motion which encompassed approximately 80 pages of the Joint Appendix to the Court of Appeals, counsel for Respondents presumably submitted the documentation which he felt was relevant to the application.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Corporation Counsel of the
City of New York,
Attorney for Petitioner.

LEONARD J. KOERNER*,
MARILYN RICHTER,
STEPHEN J. McGRATH,
PETER D. WINEBRAKE,
of Counsel.

December 9, 1996

*Attorney of Record

(4) (5)

Nos. 96-552 and 96-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

RACHEL AGOSTINI, *ET AL.*,

Petitioners

v.

BETTY-LOUISE FELTON, *ET AL.*

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *ET AL.*,

Petitioners

v.

BETTY-LOUISE FELTON, *ET AL.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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9 pp

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Nos. 96-552 and 96-553

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RACHEL AGOSTINI, *ET AL.*, *Petitioners*,

v.

BETTY-LOUISE FELTON, *ET AL.*

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *ET AL.*, *Petitioners*,

v.

BETTY-LOUISE FELTON, *ET AL.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The *amici* are national organizations that represent the American Orthodox Jewish community. We have consistently supported the principle of fair and even-handed

treatment for children who attend religious schools and for the parents who are obligated, for reasons of conscience, to enroll their children in such schools. The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs on behalf of these children and parents in numerous cases considered by this Court, including *Board of Education v. Allen*, 392 U.S. 236 (1968); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and, of course, *Aguilar v. Felton*, 473 U.S. 402 (1985).

The individual organizations represented by COLPA are:

(1) Agudath Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

(2) Agudath Israel of America is a national Orthodox Jewish public interest organization with chapters in numerous Jewish communities throughout the United States and Canada. It is dedicated to advancing Jewish social, religious and educational concerns.

(3) National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

(4) The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400

members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

(5) The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply involved in issues related to religious freedom.

(6) Torah Umesorah-National Society of Hebrew Day Schools is the coordinating body for more than 600 Jewish Day Schools across the United States.

(7) The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America with over one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

ARGUMENT

This *amicus* memorandum has one objective: to urge this Court not to delay, for procedural or technical reasons, in considering whether to overrule *Aguilar v. Felton*, 473 U.S. 402 (1985). In the decade since it was announced, that decision has wasted enormous public resources and crippled thousands of schoolchildren who need effective remedial programs to overcome learning disabilities. It has forced local school districts to conduct Title I programs in specially built movable classrooms that qualify as "neutral sites" at great public expense and has deprived children in certain schools — including many Jewish Day Schools — of remedial programs equivalent to those available to children enrolled in public schools.

A telling illustration of the effect of *Aguilar* was the situation of the schoolchildren in the Hasidic village of Kiryas Joel, which was before this Court in *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994). Because of the *Aguilar* decision, learning-disabled children in the Kiryas Joel School District were deprived of Title I programs until the New York Legislature adopted the statute that was before the Court in the *Kiryas Joel* case.

The colloquy between this Court and counsel representing Kiryas Joel demonstrated the effect of the 1985 decision on the issue:

> JUSTICE O'CONNOR: One other question, preliminarily. I guess we wouldn't be here today but for this Court's decision in Aguilar.
>
> MR. LEWIN: That's correct, Justice O'Connor. It's this Court's decision in Aguilar that precipitated the situation that required some action to be taken regarding the disabled children of Kiryas Joel.
>
> QUESTION: If Aguilar —
>
> QUESTION: And had we held —
>
> QUESTION: Excuse me.
>
> QUESTION: — otherwise, then the services would be provided with the Federal aid on the premises of the religious schools.

* * * *

> JUSTICE KENNEDY: And these services had been provided in the private schools themselves, would you then nevertheless have had the constitutional option to have the district formed as it was here?
>
> MR. LEWIN: No. If — we agree that if, in fact, the services were being provided under the pre-Aguilar procedure, there would not have been any justification for the legislature saying we have to accommodate or we have to take this step. Under those circumstances, there would be much more basis to argue that this is only being done to provide some kind of authority to these citizens who happen to be religious.

See also Kiryas Joel, supra, 114 S. Ct. at 2498 (O'Connor, J., concurring), 2505 (Kennedy, J., concurring), 2514-15 (Scalia, J., dissenting).

Every school year that *Aguilar* remains on the books means deprivation or diminution in remedial programs for thousands of children who need what Title I offers. The fear of harmful consequences expressed by this *amicus* and others, by the parties, and by the dissenters in *Aguilar* (*see* 473 U.S. at 419 (Burger, C.J.), 430-31 (O'Connor, J.)) have been exceeded by the actual experience of the last ten years. *Aguilar* has had a devastating effect. (United States Department of Education, August 1993, "Chapter 1 Services to Private Religious School Students: A Supplemental Volume to the National Assessment of the Chapter 1 Program.") No reasons of policy or legal niceties warrant subjecting thousands of additional children to more years of continued deprivation while a potential new case winds its way through the courts.

CONCLUSION

To paraphrase a motto made famous more than 2,000 years ago by Cato the Elder: "*Delenda est Aguilar.*" The sooner the better.

Respectfully submitted,

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November 1996

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Nos. 96-552 and 96-553

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
FEB 28 1997
OFFICE OF THE CLERK

RACHEL AGOSTINI, ET AL., PETITIONERS
v.
BETTY-LOUISE FELTON, ET AL., RESPONDENTS.

CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, ET AL., PETITIONERS
v.
BETTY-LOUISE FELTON, ET AL., RESPONDENTS

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX
VOLUME I
PAGES 1-298

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Petitions for Writ of Certiorari Filed October 7, 1996
Certiorari Granted January 17, 1997

Volume I of the Joint Appendix in this case consists of the original Appendix before this Court in *Aguilar v. Felton*. That original appendix is reproduced verbatim here. Page numbers for the Joint Appendix in the original *Aguilar v. Felton* proceeding are therefore identical to the page numbers for this Volume I of the Joint Appendix in *Agostini v. Felton*, 96-552, and *Chancellor v. Felton*, 96-553.

All appendix material post-dating *Aguilar v. Felton* is contained in Volume II. The Table of Contents for that material appears at p. (i) of Volume II. Relevant Docket Entries for proceedings following this Court's *Aguilar* decisions are at the beginning of Volume II, which begins at page 299.

Nos. 84-237, 84-238, 84-239

In the Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ AND BELINDA WILLIAMS, APPELLANTS

v.

BETTY-LOUISE FELTON, ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JURISDICTIONAL STATEMENTS FILED
AUGUST 10, 1984, AUGUST 13, 1984 AND AUGUST 13, 1984
JURISDICTION POSTPONED OCTOBER 9, 1984

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Reply Affidavit of Stanley Geller, Esq. for Plaintiffs, in Opposition to Defendants' Cross-Motion For Summary Judgment and in Further Support of Plaintiffs' Motion for Summary Judgment 229

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Docket No. 78C 1750

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
8-11-78		COMPLAINT FILED—Summons and additional summons issued. sk (1)
8-16-78		Summons ret. and filed/executed. fy (2)
10-19-78		Notice of motion to dismiss filed. fy (3)
11-8-78		Notice of motion for an order dismissing this action, returnable on Nov. 27, 1978. Filed. ls (4)
12-14-78		By NEAHER, J.—ORDER dated 12/13/78 that defts' motion to Stay this action is GRANTED and that this action is hereby stayed pending final disposition of National Coalition for Public Education and Religious Liberty, et al vs Joseph A. Califano, supra, and G. Hugh Wamble vs Ernest Boyer, et al, supra filed. rh (5)
7-9-79		Letter filed dated July 3, 1979, recvd from Chambers from Dept, of Justice, Washington, D.C. re pending disposition in 76 C 888. rs (6)
11-13-80		Letter filed dtd 11-4-80 from Stanley Geller to Ms. Glenn in response to her request for Status Report. fc (7)
10-2-81		CALENDAR NOTICE dtd 10/2/81 setting pretrial status conference for 10/26/81 @ 4:30 p.m., filed. Copies mailed. mw (8)
10-29-81		By NEAHER, J.—CIVIL MOTION SCHEDULING ORDER dtd 10/26/81 filed. Copies mailed. mw (9)

DATE	NR.	PROCEEDINGS
12-09-81		Defendants' Notice of Motion returnable 12-18-81 at 9:30 A.M. for an order granting leave for persons to intervene as defendants, etc., filed together with Affidavit of Charles H. Wilson. gp (10)
12-09-81		Answer of Intervenor-Defendants, filed. gp (11)
12-09-81		Defendant's Appendicies, filed. gp (12)
12-09-81		Memorandum of Yolanda Aguilar, Lillian Colon, Miriam Martinez and Belinda Williams in support of their motion for leave to intervene as defendants, filed. gp (13)
12-30-81		Defendant's Notice of Appearance, filed. gp (14)
12-30-81		Federal Defendant's response to Motion to Intervene as Defendant, filed. gp (15)
12-30-81		Defendant's Notice of Motion for substitution as a party together with Memorandum in support of his motion for substitution as a party, filed. gp (16)
01-05-82		Calendar Notice dated 01-04-82 that action is set for pre-trial conference on 01-14-82 at 4:30 P.M., filed. Parties informed. gp (17)
3-15-82		BY NEAHER, J.—Stip & order dtd 3-12-82 that the SE. of the US Dept of Education is substituted as deft HHS, Paragraph 20 is amended to add 42 USC 1983 & 1988; etc., and Leo Pfeffer, be added as atty for pltffs, filed. (see stip for details) el (18)
4-12-82		Letter from Elisa Vela, Atty, Federal Programs Branch, USDJ to Clerk, in re: enclosing deft U.S. Secretary of Eduction's Notice of filing the record in National Coalition for Public Education and Religious Lib-

DATE	NR.	PROCEEDINGS
		erty -v- Hufstedler, 446 F. Supp. 193, 489 F. Supp. 1248, filed. These papers are being filed pursuant to Stipulation. Included are: Index to Exhibits, Defts' Exhibit A, Defts' Exhibits B through Defts' Exhibits G through K, Defts' exhibits L through T, Defts' exhibit U—Volume I and defts' exhibit U Volume II, and Trial transcript. el (19)
04-14-82		Plaintiffs' Memorandum of Law in support of their motion for summary judgment, filed. gp (20)
5-12-82		Def's Joint Statement of Material Facts not in dispute filed. em (21)
5-12-82		Memorandum in Support of Def's Joint Cross-Motion for summary judgment & in opposition to pltff's motion for summary judgment filed. em (22)
5-17-82		Letter dated 5/14/82 from Elisa B. Vela, Atty Fed. Programs Branch Civil Div., to Richard H. Weare, Clerk, U.S.D.C.E.D.N.Y., enclosing Defts' Memo of Law in Support of Defts' Joint Cross-Motion for Summary Judgment and In Opposition to Pltffs' Motion for Summary Judgment and Affidavit of John F. Staehle and advising that Defts' Joint Motion and Statement of Facts Not in Dispute have been filed under separate cover by the nonfederal defts filed. rh (23)
5-17-82		Memorandum of Law in Support of Defts' Joint Cross-Motion for Summary Judgment and in Opposition to Pltffs' Motion for Summary Judgment filed together with annexed Affidavit of John F. Staehle, Deputy Director of Compensatory Education Programs, Office

DATE	NR.	PROCEEDINGS
		of Elementary and Secondary Education, U.S. Dept. of Education dated 5/12/82 rh (forwarded to chambers) (24)
6-1-82		Pltffs' counter-statement of material facts not in dispute, filed. (25)
6-1-82		Reply affidavit of Stanley Geller, filed. el (26)
6-1-82		Pltffs' reply memo filed. el (27)
10-11-83		By Neaher, J.—Memorandum and Order dated 10.04.83 that defts' motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied, filed. Clerk to enter judgment dismissing complaint. gp (28)
10-20-83		Clerk's Judgment dated 10.17.83 that the plaintiffs take nothing of the defts; that the defts. motion for summary judgment is granted; that the plaintiffs' motion for summary judgment is denied; and that judgment is entered in favor of defts. dismissing the complaint, filed. Parties informed. gp (29)
12-02	30	*** *NOTICE OF APPEAL* (pltffs-appellants) from judgment entered 10-20-83, filed with receipt #54049 for C of A docketing fee. C of A notified. Parties informed. vw
1984		
01-17	—	Record on appeal certified & sent to C of A. Ack req. vw
01-23	31	Macchiarola's Notice of cross-motion returnable 05.26.82 at 9:30 A.M. for an order pursuant to Rule 56(c), etc., filed together with Supplemental Affidavit of Lawrence F. Larkin. gp

09/04/84

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Title: Felton v Sec. US Dept of Education
Case Type: CV US
NOA: 12/02/83
Date Docketed: 12/08/83

Dkt: 83-6359
Calendar: 830964
Fee: Pd

Origin: ENY
Division: Brooklyn
Action Filed: 08/11/78
Nature of Suit: 1440

DC-Dkt: 78 CV 1750
DC-J: Neaher, Edward R.
DC Judgment Date: 10/20/83

FORMS, RECORD AND BRIEFING ACTIVITY

Local Rules Forms: 12-09-83
Sufficient Record on Appeal: 02/07/84
Supplemental Record (s) on Appeal:
Last Appellant's Brief: 02/07/84
Last Appellee's Brief: 03/30/84
Last Reply Brief:

ARGUMENT, SUBMISSION, DECISION AND MANDATE ACTIVITY

Argument Date: 04/04/84
Submission Date:
Judge 1: Feinberg, Wilfred
Judge 2: Friendly, Henry J.
Judge 3: Oakes, James L.

Writing Judge: Friendly, Henry J.

Decision Type: Rev

Decision Method: Pub.Sign.Opn
Decision Date: 07/09/84
Mandate Issued:

Citation:

Reopened:

REHEARING AND SUPREME COURT ACTIVITY

Petition for Rehearing Filed:
Petition for Rehearing Decision:
Decision Date:
Mandate Receipt:

Cert. Filed: 08/13/84
Cert. Decision:
Decision Date:
ROA Receipt:

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First Brief: 02/07/84 — Second Brief: 3/30/84

Party Name: Green, Charlotte — Type: Pla.A

Attorney: See Previous Attorney Entry — Atty Type:

Party Name: Hruska, Barbara — Type: Pla.A

Attorney: See Previous Attorney Entry — Atty Type:

Party Name: Schwartz, Meryl A. — Type: Pla.A

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Attorney: See Previous Attorney Entry — Atty Type:

Party Name: Zelon, Allen H. — Type: Pla.A

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Party Name: Williams, Belinda Type: Intv

Attorney: See Previous Attorney Entry Atty Type:

MOTIONS

Party: Aguilar (I)		Date Filed: 02/23/84
Desc: File Mot: Extend Time to File Brief	Disp: GR	Date: 02/28/84
Party: U.S. Dep't of Educ. (E)		Date Filed: 02/27/84
Desc: Extend Time to File Brief	Disp: GR	Date: 03/06/84
Party: Chancellor-Bd. of Educ. (E)		Date Filed: 02/28/84
Desc: File Motion & Brief Out of Time	Disp:	Date:
Party: Sec, US Dept of Ed (E)		Date Filed: 07/30/84
Desc: Stay Issuance of Mandate	Disp: GR	Date: 08/06/84

SCHEDULED ACTIONS

Description	Due	Extended SO	Satisfied
Index on Appeal	01/21/84		02/07/84
Record on Appeal	02/07/84		02/07/84
Appellant's Brief and Appendix	02/07/84		02/07/84
Appellee's Brief	03/05/84	03/20/84	03/30/84

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

78C 1750

NEAHER, J.

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

JOSEPH A. CALIFANO, Secretary of the United States Department of Health, Education and Welfare; ERNEST L. BOYER, United States Commissioner of Education; and FRANK J. MACCHIAROLA, Chancellor of the Board of Education of the City of New York, DEFENDANTS

COMPLAINT

Plaintiffs, by their attorney, respectfully allege:

1. This is a civil action brought by the plaintiffs for a temporary and permanent injunction against the allocation and use of the funds of the United States to finance, in whole or in part, instruction in religious schools, and to declare such use violative of the First and Fifth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 26, U.S. Code, Sections 1331, 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand Dollars ($10,000), as more fully appears hereinafter.

4. Each of the plaintiffs herein is a citizen of the United States and pays income taxes and other taxes to the United States and each is a qualified legal voter of the United States.

5. Each of the plaintiffs herein is a resident and legal voter of the State of New York and of the Eastern District of New York.

6. Defendant Joseph A. Califano is Secretary of the United States Department of Health, Education and Welfare and is sued herein in that capacity.

7. Defendant Ernst L. Boyer is the United States Commissioner of Education and is sued herein in that capacity.

8. Defendant Frank J. Macchiarola is Chancellor of the Board of Education of the City of New York and is sued herein in that capacity.

9. In 1965, the Congress of the United States enacted and, on April 11, 1965, the President of the United States approved P. L. 89-10, known as the Elementary and Secondary Education Act of 1965 (hereinafter the Act), Title I whereof authorizes federal financial support for special educational programs for educationally deprived children in attendance areas where low income families are concentrated. Section 205 (20 U.S.C. 241e-1(a) as amended) of the Act provides in part that, in order for a local educational agency to qualify for support from the Federal Government under such Title I, it must appear "that to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate. . ."

10. The Elementary and Secondary Education Act of 1965 authorizes, empowers and requires the defendant Ernest L. Boyer, in his capacity as Commissioner of Education, to pass upon all applications for federal funds to finance programs under the Act and to withhold approval from any program which does not comply with the terms, conditions and limitations of the Act.

11. Defendants Califano and Boyer have construed and applied Title I of the Act to authorize local educational agencies to assign teachers and other personnel to religious schools in order to perform educational services therein during regular school hours, and have approved the expenditure of federal funds to finance these services.

12. Defendant Macchiarola in his capacity as Chancellor of the Board of Education of the City of New York, a local educational agency, has submitted to the defendants Califano and Boyer plans for the use of Title I funds to finance the assignment of teachers and other personnel to perform educational services within the religious schools of New York City during regular school hours, and with their approval has used Title I funds for such purpose.

13. On the 19th day of May, 1975, the United States Supreme Court, in the case of *Meek* v. *Pittenger*, held that the use of tax raised funds to finance educational services performed during regular school hours on religious school premises violates the Establishment Clause of the First Amendment of the United States Constitution.

14. Notwithstanding the aforesaid decision, the defendants have continued to use Title I funds to finance the assignment of teachers to perform educational services within religious schools during regular school hours and have refused to discontinue these practices although due demand therefor has been made.

15. There are many programs within the meaning of Title I of the Elementary and Secondary Education Act of 1965 which could practicably be instituted by local educational agencies which would qualify them for the receipt of federal funds under the Act but which would not violate the provisions of the Federal Constitution. Among these programs are those to provide pupil health and dental benefits in public and nonpublic schools and programs for special instruction in courses such as reading, arithmetic, music and art, and for guidance conducted on publicly owned premises after regular school

hours and open equally to children regularly registered in public and nonpublic schools.

16. On information and belief, large sums of federal funds, the exact amounts whereof are not known to the plaintiffs but far exceeding the sum of $10,000, have been and continue to be used and, unless enjoined by this Court, will continue to be used to finance and aid, in whole or in part, educational services performed within religious schools during regular school hours.

17. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

18. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

19. Insofar as Title I of the Elementary and Secondary Execution [sic] Act of 1965 authorizes the use of federal funds to support, in whole or in part, the assignment of teachers and other personnel to perform educational services within religious schools during regular school hours, it violates the First Amendment of the United States Constitution in that it constitutes a law respecting an establishment of religion.

20. The plaintiffs pray that the following relief be granted:

(1) that the defendants and each of them be enjoined from approving or carrying out any program for the expenditure of federal funds to finance, in whole or in part, the performance of educational services in religious schools during school hours;

(2) that the Court adjudge and declare that insofar as Title I of the Act authorizes the expenditure of federal funds to finance educational services in religious schools during school hours it is unconstitutional as violative of the Establishment Clause of the First Amendment;

(3) that a preliminary injunction pending trial of the issues be granted to the plaintiffs against the defendants for the relief set forth herein;

(4) that the plaintiffs be granted such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

/s/ Stanley Geller
STANLEY GELLER
400 Madison Avenue
New York, N.Y. 10017
(212) 755-2040
Attorney for Plaintiffs

Dated:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 78C-1750

BETTY LOUISE FELTON, ET AL., PLAINTIFFS

v.

JOSEPH CALIFANO, ET AL., DEFENDANTS

ORDER

Upon consideration of defendants' Motion to Stay the instant action during the pendency of two other district court actions raising related or identical issues, *National Coalition for Public Education and Religious Liberty, et al.* v. *Joseph A. Califano, et al.*, 76 Civ. 888 (S.D. N.Y., filed February 25, 1976) and *G. Hugh Wamble* v. *Ernest Boyer, et al.*, Civ. No. 77-0254-CV-W-2 (W.D. Mo., filed April 4, 1977), or, in the alternative, to dismiss the action altogether,

And the Court having considered that Motion and the Memorandum filed in support thereof, and having found that the interests of judicial economy for itself, for counsel, and for litigants would best be served by a stay of the action because (1) the prior actions which are appreciably advanced are likely to simplify the issues and assist in determinations of law; (2) proceeding with the instant action at this time serves no useful purpose other than duplication; and (3) the hardship or inequity which the defendants will suffer outweighs any interest the plaintiffs may have in proceeding with the litigation; it is this 13th day of December, 1978,

ORDERED that defendants' Motion be and hereby is granted,

And that this action is hereby stayed pending final disposition of *National Coalition for Public Education and Religious Liberty, et al.* v. *Joseph A. Califano, supra,* and *G. Hugh Wamble* v. *Ernest Boyer, et al., supra.*

/s/ Edward H. Neaher
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 Civ. 1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

JOSEPH A. CALIFANO, Secretary of the United States Department of Health, Education and Welfare; ERNEST L. BOYER, United States Commissioner of Education; and FRANK J. MACCHIAROLA, Chancellor of the Board of Education of the City of New York, DEFENDANTS

ANSWER OF INTERVENOR-DEFENDANTS

The intervenor-defendants, by and through their undersigned attorneys, for their answer to the correspondingly-numbered paragraphs of the complaint herein; allege as follows:

1. Deny, except admit that the plaintiffs seek to enjoin certain applications of Title I of the Elementary and Secondary Education Act of 1965, *as amended*, 20 U.S.C. § 2701, *et seq.*

2. Deny, except admit that this Court has jurisdiction pursuant to Title 28 U.S.C. § 1331.

3. Admit.

4-5. Deny sufficient information to form a belief as to the truth of the allegations of these paragraphs.

6-7. Deny.

8. Admit.

9. Deny, except admit that, in 1965, the Congress of the United States enacted and the President of the United States approved P. L. 89-70, known as the Elementary and Secondary Education Act of 1965, and refer to that statute for the full terms and legal effect thereof.

10. Deny, except admit that the duties ascribed to Ernest L. Boyer have been transferred by statute to Terrell H. Bell, the Secretary of the United States Department of Education.

11. Deny, except admit that responsible federal officials have construed Title I of the Elementary and Secondary Education Act of 1965 to permit local educational services on the premises of nonpublic schools during regular school hours.

12. Deny, except admit that defendant Frank J. Macchiarola has submitted to responsible federal officials for approval plans of the New York City Board of Education to use Title I funds to pay the salaries of public schools in New York City during regular school hours.

13. Deny, except admit that the United States Supreme Court issued an opinion in *Meek* v. *Pittenger*, 421 U.S. 349, on May 19, 1975, and refer to that opinion for the full terms and legal effect thereof.

14. Deny, except admit that Title I funds have been used to pay the salaries of publicly-employed teachers who provide remedial educational services to qualified students in nonpublic schools during regular school hours.

15. Deny.

16. Deny, except admit that Title I funds in excess of Ten Thousand Dollars ($10,000.00) have been expended to pay the salaries of publicly-employed teachers who provide remedial educational services at nonpublic schools during regular school hours.

17. Admit.

18-20. Deny.

Affirmative Defense

The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, intervenor-defendants request that the complaint be dismissed with prejudice and that the defendants and intervenor-defendants be granted such other and further relief as this Court may deem just and proper.

Respectfully submitted,

PARKER AUSPITZ NEESEMANN & DELEHANTY P.C.

By /s/ Illegible
415 Madison Avenue
New York, New York 10017

—and—

WILLIAMS & CONNOLLY
839 17th Street
Washington, D.C. 20006

Attorneys for
Intervenor-Defendants

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 78C-1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HIRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION; and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

STIPULATION

It is hereby stipulated and agreed by the parties, through their respective counsel, as follows:

1. The Secretary of the United States Department of Education is substituted as defendant in this action for his predecessors Joseph A. Califano, Secretary of Health, Education and Welfare and Ernest Boyer, Commissioner of Education. The case caption is amended to reflect this substitution.

2. Paragraph 2 of the complaint is amended to add 42 U.S.C. 1983 and 42 U.S.C. 1988.

3. Paragraph 20 of the complaint is amended to add the following:

"(5) that the plaintiffs be granted the costs and disbursements and counsel fees in accordance with 42 U.S.C. 1988,"

4. Leo Pfeffer, 15 East 84th Street, New York, New York 1028, [sic] (212) 879-4500, is added as an attorney for the plaintiffs.

5. The Title I program of the City of New York, as presented by the testimonial and documentary evidence in *National Coalition for Public Education and Religious Liberty* v. *Hufstedler*, 446 F.Supp. 193, 489 F.Supp. 1248, appeal dismissed for want of jurisdiction, 101 S.Ct. 55 (1980), is substantially the same and is hereby made part of the record in this action.

Defendants shall file said record on or before April 12, 1982, the date on which plaintiffs shall file their motion for summary judgment.

Defendants shall have to and including May 12, 1982, the date of the filing of their response, within which to file updating materials or figures.

6. On or before April 12, 1982, the plaintiffs shall move for summary judgment for the relief prayed for in the complaint.

7. On or before May 12, 1982, the defendants shall respond to plaintiffs' motion and, if they deem fit, cross-move for summary judgment dismissing the complaint.

8. On or before May 26, 1982, the plaintiffs shall, if they deem fit, reply to the defendants' motion.

9. Yolanda Aguilar, Lillian Colon, Miriam Martinez and Belinda Williams may be admitted as intervenor-defendants in this action and the caption of the action shall be changed accordingly. By signing this Stipulation through their attorneys, the intervenors agree to be bound by its terms, including the schedule of dates set forth in paragraph 6, 7 and 8 of the Stipulation.

10. The parties agree that this Stipulation be entered as an order of the Court.

11. Counsel for defendant Macchiarola, Lorna Goodman, has consented to the terms of this Stipulation and authorized counsel for the federal defendant to sign this Stipulation on her behalf.

12. Counsel for defendant-intervenors, Joseph C. Markowitz, has consented to the terms of this Stipulation and

authorized counsel for the federal defendant to sign this Stipulation on his behalf.

/s/ Stanley Geller
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/s/ Elisa B. Vela
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Attorney for Federal Defendant

/s/ Lorna Goodman by EBV
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Attorney for Defendant Macchiarola

/s/ Joseph C. Markowitz by EBV
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(212) 355-4415
Attorney for Defendant-Intervenors

Dated: March 5, 1982.

IT IS SO ORDERED this 12th day of March, 1982.

/s/ Edward R. Neaher
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 78C-1750

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HIRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION; and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

NOTICE OF FILING

The parties to this action have agreed and stipulated that the record consisting of testimonial and documentary evidence in *National Coalition for Public Education and Religious Liberty* v. *Hufstedler*, 446 F.Supp. 193, 489 F.Supp. 1248, appeal dismissed for want of jurisdiction, 101 S.Ct. 55 (1980), has remained substantially the same * and that it be made a part of the record in this action. Accordingly, pursuant to that stipulation, defendant Secretary of the United States Department of Education, through his counsel, herein submits on behalf of all the parties, a true and correct copy of said record. The record consists of the following:

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* The parties have stipulated further that defendants shall have to and including May 12, 1982 within which to file updating materials or figures.

Exhibit	Description	Offered By
A	Application and program plan for the New York City Board of Education's Program of Title I Services for Nonpublic School Students, 1978-1979	Lawrence F. Larkin
B	Memorandum from Frank J. Macchiarola to Principals of Nonpublic Schools, March 1, 1979, *re* Identification of ESEA Title I Eligible Nonpublic School Pupils Residing in Designated ESEA Title I Target Areas, 1979-1980	Lawrence F. Larkin
C	Memorandum from Lawrence F. Larkin to Principals of Nonpublic Schools Enrolling Pupils Eligible for ESEA Title I Services, May 24, 1978	Lawrence F. Larkin
D	Volume I of memoranda and directives relating to administration of New York City's Title I program for nonpublic school students	Lawrence F. Larkin
E	Volume II of memoranda and directives relating to administration of New York City's Title I program for nonpublic school students	Lawrence F. Larkin
F	Volume III of of [sic] memoranda and directives relating to administration of New York City's Title I program for nonpublic school students	Lawrence F. Larkin
G	Standard requisition form of the Bureau of Supplies of the New York City Board of Education	Lawrence F. Larkin
H	Inventory control label for equipment used in nonpublic school Title I program	Lawrence F. Larkin
I	Equipment inventory card for the nonpublic school Title I program	Lawrence F. Larkin

Exhibit	Description	Offered By
J	Memorandum from Lawrence F. Larkin to Principals of Nonpublic Schools and Title I Staff Members, June 6, 1978, *re* Equipment Inventory	Lawrence F. Larkin
K	Bound volume of memoranda from Lawrence F. Larkin to principals of nonpublic schools	Lawrence F. Larkin
L	New York City Board of Education Resolution of August 31, 1966, with accompanying "Statement by Board of Education on Title I Proposals"	Lawrence F. Larkin
M	Letter from William F. Pierce, Acting United States Commissioner of Education, to Arthur L. Mallory, Missouri Commissioner of Education, July 22, 1976, with accompanying Report on the On-Site Investigation of the Participation of Private School Children in Title I, ESEA, in Jefferson City, Kansas City, St. Louis, and St. Joseph, Missouri, May 24-28, 1976	Lawrence F. Larkin
N	Analysis of Difference in Costs and Services for On-Premises and Off-Premises Services to Nonpublic School Pupils During the Regular School Day	Lawrence F. Larkin
O	Evaluation report — Central ESEA Title I Remedial Services for Eligible Nonpublic School Pupils: Corrective Reading Component, 1975-1976	Lawrence F. Larkin
P	Evaluation report — Central ESEA Title I Remedial Services for Eligible Nonpublic School Pupils: Reading Skills Center Component, 1975-1976	Lawrence F. Larkin
Q	Evaluation report — Corrective Mathematics Services for Eligible Nonpublic School Pupils, 1975-1976	Lawrence F. Larkin

Exhibit	Description	Offered By
R	Evaluation report — Central ESEA Title I Remedial Services for Eligible Nonpublic School Pupils: English as a Second Language, 1975-1976	Lawrence F. Larkin
S	Evaluation report — Central ESEA Title I Remedial Services for Eligible Nonpublic School Pupils: Clinical and Guidance Services, 1975-1976	Lawrence F. Larkin
T	Narrative Summary of Defendants' Written Evidence	Agreement of Counsel
U	Two bound volumes of affidavits of persons involved in or affected by the administration of New York City's nonpublic school Title I program	Agreement of Counsel
TRIAL TRANSCRIPT	Hearing before Judge Tenney on May 10, 1979	——

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

EDWARD R. KORMAN
United States Attorney

ABRAHAM SKOFF
Assistant United States Attorney

/s/ Lewis K. Wise
LEWIS K. WISE

/s/ Elisa B. Vela
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 78C-1750

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HIRUSKA, MERYL A. SCHWARTZ,
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v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,
and FRANK J. MACCHIAROLA, CHANCELLOR OF THE
BOARD OF EDUCATION OF THE CITY OF NEW YORK,
DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ
and BELINDA WILLIAMS, INTERVENOR-DEFENDANTS

DEFENDANTS' JOINT STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

I. *FEDERAL ASPECTS OF THE TITLE I PROGRAM*

A. *Statutory and Regulatory Overview*

1. Title I of the Elementary and Secondary Education Act, 20 U.S.C.A. § 2701, *et seq.*, *as amended*, was enacted in 1965 to provide a mechanism for funding compensatory educational programs administered by local public education agencies and directed to educationally deprived children in low-income areas. The basis for this new approach was the documented finding that learning deficiencies and poverty are positively and significantly

correl d. S. Rep. No. 146, 89th Cong., 1st Sess., U.S. Code Cong. and Admin. News 1446, 1450 (1965).

2. In enacting the Elementary and Secondary Education Act of 1965, Congress expressly recognized that "the special educational needs of children of low-income families and the impact [of] concentrations of low-income families" seriously impaired the ability of local school boards to support adequate educational programs for such children. 20 U.S.C.A. § 2701. Congress, therefore, declared it to be the policy of the United States "to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." *Id.*

3. Under Title I, grants may be provided to several types of agencies. These agencies include (a) state public agencies that are directly responsible for the education of children in institutions for neglected and delinquent children, 20 U.S.C.A. § 2781; (b) state public agencies that are directly responsible for the education of handicapped children, 20 U.S.C.A. § 2771; (c) state public educational agencies for programs for migrant children of migrant agricultural workers, 20 U.S.C.A. § 2761; and (d) local public educational agencies for children in locally operated institutions for neglected and delinquent children, 20 U.S.C.A. § 2783. This suit concerns grants to local public educational agencies for educationally deprived children in certain attendance areas. 20 U.S.C.A. § 2711. The term "local educational agencies" means a public board of education or other public authority, legally constituted within the state to have administrative control and direction over, or to perform a service or function for, public elementary and secondary schools within a city, county, township or other political subdivision within a state. 20 U.S.C.A. § 2854(10). The local edu-

cational agency involved in this case is the New York City Board of Education. Def. Exh. U (Tab A-4, ¶ 14).

4. The Act provides for annual appropriations by the Congress to support programs proposed by local educational agencies ("LEAs") and approved by state educational agencies ("SEAs"). 20 U.S.C.A. § 2731. All such programs are administered solely by the LEA in the affected localities, and staffed solely with employees of the LEA. 20 U.S.C.A. § 2734(m). The Title I program is administered at the federal level by the United States Commissioner of Education. 20 U.S.C.A. § 2702 *et seq.*

5. The educational services that may be provided under Title I include remedial training in reading and mathematics, the teaching of English as a second language, diagnostic testing, and special programs for the physically handicapped. Def. Exh. U (Tab A-1, ¶ 4).

6. Title I programs are made available to children regardless of whether they attend a public or a nonpublic school. The only bases for eligibility are that the school district and attendance area in which the children reside contain a specified concentration of children of families below the poverty level and that the child be educationally deprived. 20 U.S.C.A. § 2733(a); 34 C.F.R. §§ 201.50-201.52, 201.70-201.71. Educationally deprived children are those who need special educational assistance to raise their educational attainment to that appropriate for children of their age. 34 C.F.R. § 201.4.

7. Title I establishes the formula for measuring the maximum grant that the SEA may make to any LEA. 20 U.S.C.A. § 2711(a)(2)-(3); 34 C.F.R. § 201.12. The size of grants to be awarded to the various LEAs is based upon the distribution of children from low-income families. 20 U.S.C.A. § 2711(a)(2)-(3); 34 C.F.R. § 201.12.

8. In addition, special grants are made available for funding programs for LEAs in states that have a substantially greater than average per-pupil expenditure for remedial educational programs. 20 U.S.C.A. §§ 2721-22.

9. Funds under Title I may be provided by the SEA to the LEA only for programs that meet the statutory criteria. As a condition for being authorized to draw upon Title I funds, the SEA must file an application and a program plan that contains assurances that the SEA will permit expenditures only for approved projects and that those projects will comply with the requirements of Title I. 20 U.S.C.A. §§ 2802, 2811. The plans submitted to the SEA by LEAs must include a statement describing the purposes for which the federal funds to be supplied under Title I will be used during the fiscal years for which the program plan is submitted. 20 U.S.C.A. § 2731.

10. To be eligible for Title I funding, an LEA must submit an approvable application to the SEA. 20 U.S.C.A. § 2731. To be approvable, the application must demonstrate that the LEA will meet, *inter alia*, the following criteria:

(a) Payments will be made only for the costs of programs and projects which will supplement rather than supplant non-federally funded programs that would have been made available in the absence of Title I funds. 20 U.S.C.A. § 2736(c); 34 C.F.R. § 200.92, 201.130-201.144.

(b) Programs and projects funded with Title I funds will be designed to meet the special educational needs of educationally deprived children in attendance areas having high concentrations of children from low-income families and will be of sufficient size, scope and quality to give reasonable promise of meeting the affected children's special educational needs. 20 U.S.C.A. § 2734(a), (d).

(c) Eligible nonpublic school children must be able to participate on an equitable basis in suitable Title I programs. 20 U.S.C.A. § 2740; 34 C.F.R. § 76.654.

(d) Title I funds will be controlled and administered soley by the LEA. 20 U.S.C.A. § 2734(m).

(e) The LEA will provide for the measurement of program effectiveness on a regular basis and will provide sufficiently detailed information to the SEA to enable it

to determine student achievement and local compliance with the requirements of Title I. 20 U.S.C.A. §§ 2734(g), 2821.

(f) Information derived from educational research, demonstration and similar projects will be disseminated to administrators and teachers, and promising educational innovations derived thereby will be adopted by the LEA. 20 U.S.C.A. § 2734(h).

(g) An advisory council for the school district and separate councils for each school in which Title I programs are carried out will be established, composed principally of the parents of eligible children, and authorized to advise the LEA on planning, implementation and evaluation of Title I programs. 20 U.S.C.A. §§ 2734(j), 2735; 34 C.F.R. §§ 201.150-201.162.

11. In making its application to the SEA for Title I funding, the LEA must demonstrate that it has taken the following steps in formulating its proposed programs or projects:

(a) reviewed all available data, including that developed from prior Title I projects, to determine the incidence and severity of educational deprivation among children;

(b) selected the eligible attendance areas to be served (project areas), the age or grade level of the children to be served, and the particular types of educational needs that the projects will address;

(c) identified all educationally deprived children in the target age or grade within the project area who have the type of educational needs that the projects are designed to satisfy;

(d) selected those educationally deprived children identified in (c) who are most in need of special assistance;

(e) specified the criteria by which educationally deprived children in the project area are to be selected to participate in the Title I projects;

(f) employed adequate diagnostic techniques to determine the special educational needs of the children chosen to participate in the Title I projects; and

(g) consulted with teachers, parents and other knowledgeable persons concerning the needs of the children to be served in the project areas. 20 U.S.C.A. §§ 2731-34; 34 C.F.R. §§ 200.30-200.31.

12. The LEA's application must also describe in detail, *inter alia*, the proposed project, including its objectives and their relationship to the children's educational needs, the staff and material to be utilized, the time periods and locations for the project services, the number of children involved and their educational needs, the evaluation techniques to be utilized, the budget required for the project, and plans for consultation with parents. 20 U.S.C.A. §§ 2731-34; 34 C.F.R. §§ 201.40-201.41.

13. The SEA may approve the project only if it is consistent with the requirements listed in paragraphs 10, 11 and 12, *supra*, and if the SEA finds that: the project shows reasonable promise of meeting the special educational needs of the participating children; the evaluation techniques are adequate; the project is large enough and yet sufficiently concentrated to give reasonable promise of attaining its educational objectives; the project is not designed to meet, and will not meet, the general needs of any school or student body at large; the Title I services will be directed only to eligible children selected in accordance with the procedures set forth in the Department's regulations; educational services financed by state and local funds are provided on an equitable basis to all children in the public schools without regard to the availability of Title I funds; and such services are provided on an equitable basis to eligible nonpublic as well as public school students. 20 U.S.C.A. §§ 2811, 2821; 34 C.F.R. §§ 76.654, 200.110-200.113.

14. Since eligibility to participate in Title I programs is not limited to children in public schools, special provi-

sion is made in the Title I statute and in the regulations issued thereunder by the Department of Health, Education and Welfare to assure that such services are available to all educationally deprived children in project areas. Specifically with respect to educationally deprived children enrolled in private schools and residing within the project area, the statute and regulations require that the LEA provide genuine opportunities to participate in Title I educational services that meet their special educational needs. 20 U.S.C.A. §§ 2732-33, 2740; 34 C.F.R. §§ 76.651, 76.654.

15. Among the alternatives for such participation are dual enrollment, educational radio and television, and educational services and equipment on other than public school premises. More generaly, [sic] the LEA is required to determine the needs of educationally deprived children enrolled in private schools and meet those needs on a basis comparable in quality, scope and opportunity for participation to that used in providing for participation in the program by educationally deprived children enrolled in public schools. 20 U.S.C.A. § 2740; 34 C.F.R. § 76.654.

16. To assure that Title I funds are used only for their designated purpose of correcting educational deprivation among children in poverty-stricken areas and not to aid either public or nonpublic schools or other institutions, the Title I regulations provide that Title I funds may not be used to provide services that would otherwise be provided to the children served by Title I. 34 C.F.R. § 76.658.

17. To assure that all Title I programs are secular both in content and in setting, the Title I regulations impose a number of restrictions on the services to be provided to nonpublic school students. They include the following:

(a) Public school personnel may be made available on other than public school premises only to the extent necessary to provide special services (including therapeutic,

remedial, welfare and health services, guidance and counseling and breakfast programs for poor children) to those educationally deprived children for whom the Title I projects were designed, and only if such services are not otherwise provided in the nonpublic schools. 34 C.F.R. §§ 76.658, 76.659.

(b) The LEA must maintain exclusive direction and control over the provision of Title I services, wherever they are provided. 34 C.F.R. § 76.661.

(c) Nonpublic school teachers are not to be paid in a Title I project except to perform services outside their regular hours of duties and under public supervision and control. 34 C.F.R. § 76.660.

(d) Control over the use of all Title I funds and all property acquired with such funds must remain in the LEA. The LEA must maintain title to such property. If Title I equipment is to be used in a project conducted on the premises of a nonpublic school, the LEA must retain sole control of the equipment, as well as of the project itself, and must remove the equipment from the nonpublic school premises, if necessary, to prevent its being used for any purpose other than as part of the Title I project. 34 C.F.R. § 76.661.

(e) Any project carried out on the premises of a public school and involving joint participation of public and nonpublic school children must avoid classes separated according to school enrollment or religious affiliation of the children. 34 C.F.R. § 76.657.

18. Failure by the SEA to comply with any of the requirements of Title I pertaining to approval of local projects, disbursement of funds or supervision of the LEA results in a termination or suspension of funding. 20 U.S.C.A. § 2836(a); 34 C.F.R. §§ 200.260-200.263. If, however, the LEA is prohibited by state or local law from providing for participation by nonpublic school students on an equitable basis in Title I programs or substantially fails to do so, the United States Commissioner of Education is required to waive the statutory requirement that

the state provide for such participation, and instead arrange directly for the provision of Title I services to eligible children enrolled in nonpublic schools. 20 U.S.C.A. § 2740(b); 34 C.F.R. §§ 201.90-201.97.

B. *The Scope of the Title I Program*

19. Title I programs are conducted throughout the United States, Puerto Rico and outlying territories. In the 1980-1981 school year, approximately 5,200,000 public school children and approximately 190,000 nonpublic school children received educational and related services through Title I projects. Affidavit of John F. Staehle ¶ 3.

20. For the 1982 fiscal year, approximately $3,100,000 has been allocated to grants under Title I. Affidavit of John F. Staehle ¶ 3.

C. *The Missouri Study*

21. In February, 1976, the United States Commissioner of Education received a written complaint from representatives of nonpublic school children in Missouri to the effect that the Title I services provided to educationally deprived children enrolled in nonpublic schools in the State of Missouri were not equitable—that is, not comparable to the services provided to such children enrolled in public schools. Def. Exh. U (Tab A-2, ¶ 4). The basis for the complaint was that, while eligible public school children participated in Title I remedial programs during the regular school day, children enrolled in nonpublic schools received such instruction only early in the morning before school had begun, or late in the afternoon after school had ended, or else on Saturdays or in the summer. Missouri officials had construed state law as prohibiting the provision of such services to nonpublic school children at their schools during school hours. *Id.* at ¶ 5.

22. Since the Commissioner is required, under Title I, to arrange directly for the provision of services to eligible

nonpublic school students if the state agency is not providing "comparable" services to them, a study was conducted by representatives of the Commissioner to determine whether Title I projects conducted before or after the school day on the premises of nonpublic schools were comparable to the services provided public school students during the day. Def. Exh. U (Tab A-2, ¶ 6).

23. The first stage of the study was to investigate Title I services in four large LEAs in Missouri. This investigation included on-site visits to the LEAs during the week of May 24-28, 1976. The investigation also included a review of budget statistics and attendance data for eligible public and nonpublic school students, and interviews with Title I administrators and teachers, public and nonpublic school officials and teachers, and parents of public and nonpublic school children, including members of the Title I Parent Advisory Councils. Def. Exh. M; Def. Exh. U (Tab A-2, ¶¶ 7-13).

24. The investigation demonstrated that Title I services provided in the four LEAs at times other than during the school day were not, and probably could not, be comparable in quality, scope and opportunity for participation, to services provided during the regular school hours. Def. Exh. U (Tab A-2, ¶ 14).

25. The principal reasons for this inequity were found to be the following:

(a) Although planned student attendance by nonpublic school children was equivalent to planned attendance by public school children, actual participation by nonpublic school children was much lower than that of public school children because (i) nonpublic school students were too fatigued after a full day of school to attend the Title I program; (ii) the after-school program conflicted with other activities planned by the eligible students; (iii) parents were reluctant to allow their children to stay after school ended because they would then not return home until late in the day; (iv) the children often

viewed staying after the school day as punishment; (v) many students had after-school jobs or family chores to perform; (vi) parents were concerned for the safety of their small children; and (vii) children were rarely willing to attend such programs on a Saturday.

(b) The children actually attending after-school programs did not receive comparable services because (i) they were fatigued or lacked concentration; (ii) Title I personnel—many of whom had other duties during the regular school day—also were tired, and thus many performed at less than full effectiveness; and (iii) in some cases, it was impossible to hire sufficient numbers of qualified specialists to provide services after the regular school day.

(c) Serious logistical problems developed because of the necessity of conducting Title I programs other than during the regular school day. They included the following: (i) buildings were sometimes not opened early enough for programs scheduled to begin before regular school hours; (ii) schools were sometimes unable to provide proper supervision for participating children during the time interval between the end of the regular school day and the commencement of the Title I programs; and (iii) supervision of children walking from their nonpublic school to a public school center was inadequate.

(d) The optimum length and frequency of remedial instruction was determined by Missouri State guidelines to be one 50-minute class every day during the school week. The scheduling of Title I classes after school or on Saturday, however, meant that programs were conducted only once or twice a week, or for longer periods than 50 minutes—one hour and 15 minutes to two hours on weekdays and three to four hours on Saturdays.

(e) Although maximum effectiveness of Title I services depended to a large degree upon contact and coordination between Title I teachers, on the one hand, and the regular school teachers and parents, on the other, such contact was much less frequent when the Title I pro-

gram was conducted before or after the regular school day or on Saturdays.

(f) Significantly larger proportions of budgeted Title I funds were spent on non-instructional expenses, such as security and transportation, in Title I programs directed to eligible nonpublic school students than in the programs for public school students. Consequently, proportionately less was spent for instructional expenses in the programs for nonpublic school children. Def. Exh. U (Tab A-2, ¶ 15).

26. Based upon the findings of this study, the Commissioner determined that the Title I services provided to eligible nonpublic school students in the four LEAs in Missouri were not comparable in quality, scope or opportunity for participation, and consequently directed that the United States Office of Education arrange directly for the provision of such services in those LEAs. A similar determination has been made with regard to additional LEAs in the state. Def. Exh. U (Tab A-2, ¶ 16).

27. A true copy of the "Report on the On-Side Investigation of the Participation of Private School Children in Title I, ESEA, in Jefferson City, Kansas City, St. Louis, and St. Joseph, Missouri, May 24-28, 1976," is part of Def. Exh. M.

II. *NEW YORK CITY'S TITLE I PROGRAM*

A. *Overview of the New York City Program*

28. The New York City Board of Education ("Board") is responsible for the largest program of remedial educational services under Title I in the United States. The Board has received $147,850,892 in Title I funds for the 1981-1982 school year, an amount that represents 63.32 percent of New York State's total Title I allocation for that year. Supplementary Affidavit of Lawrence F. Larkin ¶ 9. Of those Title I funds available to the Board for the 1981-1982 school year, $20,003,028, or 13.5 per-

cent, has been allocated for Title I services for nonpublic school students. *Id.* at ¶ 9.

29. For the 1981-1982 school year, a total of 302,382 public and nonpublic school students in New York City were eligible for Title I remedial services. Of that total, 40,120, or 13.2 percent, were enrolled in nonpublic schools. *Id.* at ¶ 9. Budget limitations, however, made it impossible to provide Title I remedial services to all of those eligible nonpublic school students. Of the total number of eligible nonpublic school students, approximately 21,000 were expected to receive Title I remedial services during the 1981-1982 school year. Those students attend 231 of the 993 nonpublic schools in New York City. *Id.* at ¶ 7.

30. The Board's approved Title I program plan provides five types of remedial educational programs to qualified nonpublic school students. Those five programs are as follows: a Corrective Reading Program, a Reading Skills Program, a Corrective Mathematics Program, an English as a Second Language Program, and a Clinical and Guidance Program. Def. Exh. U (Tab A-4, ¶ 15). Those remedial services are comparable to those provided for qualified public school students in New York City.

B. *New York City's Title I Organization*

31. The Board is the designated local educational agency in New York City and, as such, has ultimate responsibility for the New York City program. Def. Exh. U (Tab A-4, ¶ 14). The Board's principal Title I functions have been to establish general policies and priorities for the operation of the program. The Board thus has approved the method for identifying low-income and educationally disadvantaged children, the annual Title I application and program plan submitted to the New York Education Department, the allocation of funds between the public and nonpublic school programs, and personnel policies. Def. Exh. U (Tabs A-3 and A-4, ¶ 26).

32. Responsibility for implementing and monitoring the New York Title I program rests with the Chancellor of the Board of Education, Frank J. Macchiarola, who is a defendant in this action. Overall administration of the Title I program has been delegated to the Board's Office of Funded Programs, which coordinates most non-tax levy, reimbursable programs of the Board. Perry Davis is the Acting Director of the Office of Funded Programs. Def. Exh. U (Tab A-4, ¶ 27).

33. Direct supervision of the Title I program for nonpublic school students throughout New York City is the responsibility of the Office of Special Projects. The Director of that office is Lawrence F. Larkin. That agency of the Board employs teachers and other professionals to provide Title I remedial services to nonpublic school students, develops the guidelines and procedures for implementing those Title I remedial services, assigns teachers and other professionals to provide services to nonpublic school students, exercises sole supervision over the teachers and other professionals, and handles all other aspects of the administration of the nonpublic school Title I program. *See generally* Def. Exh. U (Tab A-4).

34. In carrying out its administrative responsibilities, the Office of Special Projects coordinates its activities with several other departments within the Board. For example, the Bureau of Supplies orders and distributes instructional materials and other supplies required by nonpublic school Title I teachers and other professionals. The Office of Business and Administration establishes regulations and procedures for fiscal control and authorized expenditure of funds. And the Division of Personnel screens applicants for all teaching and supervisory positions in the nonpublic school Title I program. Def. Exh. U (Tab A-4, ¶ 29).

C. *Determination of Eligible Students*

35. Consistent with the Act and the applicable Title I regulations, the Board has developed procedures for

determining which public and nonpublic school students qualify for Title I remedial services. Two factors are taken into account in the eligibility determination: low income and demonstrated educational deprivation. Def. Exh. U (Tab A-4, ¶ 17).

36. The first of those requirements—economic disadvantage—is satisfied if a student lives in a "target public school attendance area" with a high concentration of children from low-income families. Def. Exh. U (Tab A-4, ¶ 18). In New York City, that determination is made annually on the basis of whether a public school attendance area—elementary, intermediate or high school—has a percentage of school-age children living at or below the poverty level that is the same as or greater than the city-wide percentage of such children. *Id.* The city-wide poverty percentage is determined by a two-step process.

(a) First, the Board determines the total number of New York City children, ages 5 through 17, who are carried on the rolls of the Aid to Families with Dependent Children ("AFDC") program. To be eligible for AFDC assistance, a New York City family of four must have an annual income of less than $5,712. The AFDC total is then weighted as 60 percent. To this figure is added the total number of New York City children who participate in the federal free lunch program, weighted at 40 percent. Eligibility for this aid program is based on a sliding scale of family income and family size. Weighted figures are used in an attempt to reduce duplication in the calculation of poverty.

(b) Second, the Board devises the sums of the weighted AFDC and federal free lunch program totals by the total number of New York City public school children. The resulting figure is the city-wide target attendance area low-income percentage. Def. Exh. U (Tab A-4, ¶ 19).

37. For the 1981-1982 school year, the city-wide cut-off poverty percentage was 45.76 percent. That figure was arrived at by the following computation:

$$\frac{326{,}014 \times 60\% + 521{,}867 \times 40\%}{883{,}568} = \frac{404{,}354}{883{,}568} = 45.76\%$$

Thus, any public school attendance area which had a poverty percentage equal to or higher than 45.76 percent was designated as an ESEA Title I target attendance area. Supplementary Affidavit of Lawrence F. Larkin ¶ 11.

38. The procedure for determining the poverty percentage for individual school attendance areas is identical to that used in computing the city-wide poverty percentage. The sum of the weighted AFDC and federal free lunch program totals is divided by the number of public school students on the register of the school. There are more than 900 public school attendance areas in New York City and, for the 1981-1982 school year, 561 of those areas were designated as Title I target attendance areas. *Id.* at ¶ 11.

39. Under the Board's guidelines, a student, whether he attends a public or a nonpublic school, must live within a target public school attendance area to satisfy the economic disadvantage criteria for Title I eligibility. That requirement is not satisfied if the student lives outside a target public school attendance area but attends a school within an adjacent target public school attendance area. Consequently, residency within a designated low-income neighborhood is an indispensable threshold eligibility requirement. For that reason, Title I remedial services follow the student, and eligibility for those services bears no relationship to the location of a school or whether a student attends a public or a nonpublic school. Def. Exh. U (Tab A-4, ¶ 22).

40. The second Title I eligibility requirement—educational deprivation—is based on a determination that a student is performing below a stipulated competency level on standardized tests in reading or shows other evidence of educational disadvantage. This condition applies equally to public and nonpublic school students. Un-

der the Board's procedures, a student must satisfy one of the three following criteria to be considered educationally deprived:

(a) a performance level below minimum competency in reading as measured by achievement under the 24th percentile on the New York State Pupil Evaluation Program tests or by the equivalent total reading score on the Metropolitan Achievement Test or Science Research Associates test;

(b) identification as non-English-speaking as determined by a ranking of "C" or below on the New York City Scale, "Rating Oral Language Ability"; or

(c) identification as a "handicapped child" according to the definition provided by the United States Commissioner of Education. Def. Exh. U (Tab A-4, ¶ 23).

41. Based on the dual eligibility criteria, a total of 302,382 public and nonpublic school students were eligible for Title I services during the 1981-1982 school year. Supplementary Affidavit of Lawrence F. Larkin ¶ 9. Under the New York City program, there are no exceptions to the rule that no public or nonpublic school student may receive Title I remedial services unless he meets both the poverty and learning disability requirements. The type of school attended by the student—whether public or nonpublic, church-related or non-church-related—is irrelevant in determining a student's entitlement to Title I services. Title I eligibility standards are religiously neutral. Def. Exh. U (Tab A-4, ¶ 25).

D. *Funding New York City's Title I Program*

42. New York City receives an annual allocation of Title I funds from the New York State Education Department on the basis of a county-by-county calculation of the number of eligible children below the poverty level, plus other eligible children in institutions and foster homes. To determine New York City's share of the Title I funds allotted to the State, the State Educa-

tion Department uses the census count of low-income children and the AFDC program rosters of the New York City Department of Social Services. To arrive at the *per capita* share, the State Education Department divides the number of eligible children in the City into the State's overall allocation from the United States Office of Education. Def. Exh. U (Tab A-4, ¶ 30).

43. To meet its obligation to provide equitable and comparable Title I services to nonpublic school students, the Board allocates available Title I funds between public and nonpublic school children according to a *per capita* formula based on the total number of public and nonpublic school students eligible for Title I services. The amount of Title I funds allocated to nonpublic school students is based only on the percentage of those students who meet the statutory qualifications of economic and educational disadvantage and not on the total number of students enrolled in nonpublic schools in New York City. Def. Exh. U (Tab A-4, ¶ 33).

44. Although all nonpublic school students who are statutorily eligible to participate in the program are counted in the allocation of Title I funds between public and nonpublic school students, budgetary and logistical problems make it impossible to provide Title I services to all of those eligible nonpublic school students. Similar problems make it impossible to provide Title I remedial services to all eligible public school students. However, the amount of money allocated by the Board for each eligible public and nonpublic school student is equivalent. Def. Exh. U (Tab A-4, ¶¶ 34-35, 38).

45. The initial determination of how many of the eligible nonpublic school students will receive Title I remedial services is based on the number of teachers and other professionals who can be hired from available funds. Determining which of the eligible students receive the services then depends on the number of eligible students in a particular school and the administrative feasibility of assigning one or more teachers or professionals to that school. Def. Exh. U (Tab A-4, ¶ 35).

46. The average salary and benefits paid to teachers assigned to the nonpublic school Title I program for the 1981-1982 school year is $37,921. Supplementary Affidavit of Lawrence F. Larkin ¶ 8. Eight years ago, when large numbers of part-time teachers were employed, the average cost was $12,000. The number of Title I professionals assigned to the nonpublic school Title I program has decreased from approximatley 700 to 532 during those eight years. *Id.*; Def. Exh. U (Tab A-4, ¶ 37).

E. *Available Title I Services*

47. Consistent with the statutory and regulatory scheme of Title I, no public funds are disbursed to nonpublic schools under the New York City program. Rather, the Board provides five types of remedial services to nonpublic school students who satisfy Title I eligibility criteria. The services provided are remedial reading, a reading skills center, remedial mathematics, English as a second language, and clinical and guidance services. Def. Exh. U (Tab A-4, ¶ 39). Those services are provided by teachers and support professionals who are employees of the Board and subject solely to the supervision and control of the Board. *Id.* at ¶ 52.

48. In determining the types of remedial services to be provided to nonpublic school students under Title I, the Board has been guided by the statutory requirement that those services supplement, and not supplant, instruction and instructional services already being provided by the nonpublic schools themselves. Thus, in a 1966 resolution, the Board decided against providing speech improvement and library services for nonpublic school students under Title I because those services might be construed as being outside of the limited area of remedial and therapeutic services and might constitute services to institutions rather than to children. Def. Exh. L. As a result, no form of remedial services for nonpublic school students under Title I has been provided until a determination has been made that the particular services are

not being provided by the nonpublic schools. Def. Exh. U (Tab A-4, ¶ 40).

49. With the exception of the clinical and guidance program, the several remedial programs available to nonpublic school students are designed to provide instructional services by specially trained remedial teachers to poor and educationally disadvantaged children to assist them in improving their skills in the English language, reading and mathematics.

(a) The remedial reading program is designed to supplement the students' regular reading program and to raise the achievement levels of students in grades one through twelve who are reading one or more years below their grade level.

(b) The reading skills center program provides more intensive remedial reading instruction for students in grades four through eight whose reading achievement levels are as much as five years below grade level.

(c) The remedial mathematics program offers remedial instruction to students in grades one through twelve whose scores on standardized tests show them to be six months or more below grade level in mathematics.

(d) The English as a second language program is designed primarily for very young children or students who have recently arrived in the United States. That program provides basic instruction in the English language, with emphasis on oral proficiency, to enable the students to achieve the competency and fluency in the English language which is necessary for them to participate effectively in regular instructional programs. Def. Exh. U (Tab A-4, ¶¶ 42-46).

50. The clinical and guidance program involves support services by guidance counselors, school psychologists, social workers and psychiatrists. The support services are available only to students actually enrolled in Title I instructional programs. The clinical and guidance program is designed to enhance student achievement in the Title I instructional programs by providing diagnosis and

treatment for those students who, because of emotional and related problems, are not making expected progress in the remedial instruction programs. The success of this support program is evaluated in terms of whether students perform better in the Title I instructional programs. Def. Exh. U (Tab A-4, ¶ 47).

51. The Title I instructional services are generally provided to groups of about 10 students with an emphasis on individualized instruction. The classes meet at least once a week and, in cases of serious learning deficiencies, they meet as often as five times per week. These remedial services are designed primarily to reach children in grades one through six, but students in the higher grades with significant learning difficulties will be provided services if teachers are available. A Title I teacher ordinarily works with no more than 100 students during a five-day work week. Def. Exh. U (Tab A-4, ¶¶ 49-50). The affidavits of 29 Title I teachers and their supervisors describe the Title I instructional programs in considerable detail. *See* Def. Exh. U (Tabs A-5 to A-32).

52. The clinical and guidance professionals provide diagnostic testing, consultation and counseling services on an individual basis. Guidance counselors will occasionally provide services in group sessions when children in the group are experiencing common problems. The affidavits of several clinical and guidance professionals and their supervisors provide a detailed description of the types of services they provide to students in nonpublic school Title I instructional programs. *See* Def. Exh. U (Tabs A-33 to A-46).

F. *Hiring and Assignment Policies*

53. The teachers and other professionals who provide Title I remedial services to nonpublic school students are regular salaried employees of the Board. In all respects, they are similar to their counterparts teaching in regular classrooms or Title I programs in the public schools. All

teachers and other professionals employed by the Board, whether they are assigned to the nonpublic school Title I program or to public school programs, are subject to the provisions of the employment contract negotiated and executed by the Board and the United Federation of Teachers, must have an appropriate license from the Board, and are subject to the sole control and supervision of the Board. The Board's Division of Personnel is responsible for hiring and assigning teachers and other professionals to the nonpublic school Title I program. *See generally* Def. Exh. U (Tab A-3).

54. When the Title I program was first implemented, New York City was experiencing a shortage of qualified teachers. To avoid reassigning teachers from the public schools, the Board adopted a policy in 1966 of appointing only substitute teachers to the nonpublic school Title I program. That preference for the substitute teachers continued until September 1975, when New York's fiscal crisis drastically altered the assignment procedures for all teachers in the New York City public school system. Def. Exh. U (Tab A-3, ¶¶ 29-35).

55. Because of the fiscal crisis, the Board laid off some 20,000 persons, including 9,000 regularly appointed teachers and supervisors. Under the Board's contract with the United Federation of Teachers, the Board was required to offer available teaching positions to those regularly appointed teachers who had the most seniority. Those with less seniority were "excessed" and placed on a list of qualified and available teachers, ranked according to their seniority. Further layoffs in September 1976 added to the number of persons on the "excess" list. As new teaching positions became available after the "excess" list was established, those positions were offered to the teachers on the list with the most seniority. Most appointments of teachers to the nonpublic school Title I program were made from the "excess" list. After September 1978, teachers have been appointed to that program based on

their seniority on standard eligibility lists. Def. Exh. U (Tab A-3, ¶¶ 31-37).

56. Teachers and other professionals referred to the nonpublic school Title I program by the Division of Personnel are interviewed by the coordinator of the particular remedial program in which vacancies exist. Assignment to the nonpublic school Title I program is purely voluntary. If, for any reason, a teacher prefers not to work in a nonpublic school setting, he may refuse appointment to the program and not lose his seniority position on existing eligibility lists. Def. Exh. U (Tab A-4, ¶ 54).

57. The data collected by the Division of Personnel on teachers working in the New York City school system or applicants for positions in the system does not include any information concerning a person's religious affiliation. Def. Exh. U (Tab A-3, ¶ 37). The coordinators who interview persons referred to the nonpublic school Title I program make no inquiry concerning the person's religious affiliation or beliefs during the interview. For those reasons, the religious affiliation of a teacher, or the lack of any such religious affiliation, has no bearing on the decision to appoint the teacher to the nonpublic school Title I program or on the assignment of teachers and other professionals to particular nonpublic schools whose students receive Title I remedial services. Def. Exh. U (Tab A-4, ¶¶ 55-56).

58. Once a teacher or other professional is appointed to the nonpublic school Title I program, the determination of which nonpublic schools the teacher or other professional will work in is made solely by the administrators of the Bureau of Nonpublic School Reimbursable Services. Nonpublic school officials have no voice in the initial assignment of a Title I teacher or other professional. There is no known instance of any non-public school principal requesting or refusing the initial assignment of a Title I teacher or other professional on religious grounds or for any other reason. Def. Exh. U (Tab A-4, ¶ 56).

59. The administrators of the Bureau of Nonpublic School Reimbursable Services are solely responsible for decisions involving the reassignment, transfer, discipline or discharge of Title I teachers and other professionals. No reassignments or transfers will be made during a school year. There is no known instance of any nonpublic school official requesting the reassignment or transfer of a Title I teacher or other professional on religious grounds. No teacher or other professional has sought reassignment to a different nonpublic school or a transfer out of the nonpublic school Title I program for religious reasons. Def. Exh. U (Tab A-4, ¶ 57).

60. The amount of time that a particular Title I teacher or other professional will spend at any one nonpublic school is determined by the number of students at that school who are eligible for and in need of particular remedial services. Def. Exh. U (Tab A-4, ¶ 58). The vast majority of Title I teachers and other professionals are itinerant. During the 1981-1982 school year, approximately 78 percent of all Title I teachers and other professionals spent less than five days a week at the same nonpublic school and worked in more than one nonpublic school. Children in 180 of the 231 nonpublic schools with Title I services received those services from itinerant teachers or support professionals. All social workers, psychologists and psychiatrists in the nonpublic school Title I program are itinerant. Supplementary Affidavit of Lawrence F. Larkin ¶ 8.

61. Although the Board maintains no record of the religious affiliations of the teachers and other professionals assigned to the nonpublic school Title I program, the affidavits of Title I teachers demonstrate that the vast majority of them work in nonpublic schools with religious affiliations different from their own. Def. Exh. U (Tabs A-7 to A-15, A-17 and A-18, A-20 to A-26, A-28 to A-32, A-36 to A-46). A total of 73.5 percent of those persons are of a different religious faith than the schools to which they were assigned, and another 17.7 percent

work in at least one nonpublic school with religious affiliations different from their own.

G. *Restrictions on Teaching Activities*

62. Each teacher and support professional assigned to the nonpublic school Title I program is provided with a set of detailed written instructions by the Bureau of Nonpublic School Reimbursable Services which delineates his responsibilities in the program and the restrictions imposed on his activities. Def. Exh. U (Tab A-4, ¶¶ 28, 62). Those written guidelines are supplemented regularly by oral instructions provided during regular in-service training programs. *Id.* at ¶ 63. The restrictions set forth in those written and oral instructions are consistent with the restrictions set forth in the Title I regulations issued by the Office of Education. *Id.* at ¶ 28. Copies of the written guidelines given to Title I teachers are marked as Def. Exhs. D, E and F.

63. The written and oral instructions emphasize the independence of Title I teachers and other professionals from nonpublic school authorities. Among other things, those instructions stress:

(a) Title I teachers and other professionals are accountable only to their Title I supervisors and are not subject to the supervision of any nonpublic school officials. *E.g.*, Def. Exh. F, p. 136; Def. Exh. U (Tabs A-8, ¶ 8; A-40, ¶ 9).

(b) Title I teachers and other professionals are assigned to a nonpublic school only to provide services to those students who meet the Title I eligibility criteria of economic and educational disadvantage. *E.g.*, Def. Exh. F, p. 130; Def. Exh. U (Tabs A-14, ¶ 9; A-28, ¶ 8).

(c) The Title I teachers and other professionals, while they may consult with nonpublic school teachers and administrators on the educational needs of eligible Title I students, are solely responsible for the selection of stu-

dents who participate in the program. *E.g.*, Def. Exh. F, pp. 107-08; Def. Exh. U (Tabs A-11, ¶ 11; A-21, ¶ 12).

(d) Title I teachers and other professionals must administer their own standardized tests to each child tentatively selected to receive services, and not rely on tests administered by the nonpublic schools, to assure that the students finally selected meet the requirement of educational deprivation. *E.g.*, Def. Exh. F, pp. 210-19.

(e) Title I teachers and other professionals must take all necessary steps to assure that materials and equipment provided them for their Title I activities are used only in connection with the Title I program and are not diverted for use in the regular instructional program of the nonpublic school. *E.g.*, Def. Exh. F, p. 3; Def. Exh. U (Tabs A-9, ¶ 9; A-20, ¶ 8).

(f) Title I teachers and other professionals are not to engage in team-teaching or any other cooperative instructional activities with nonpublic school teachers. *E.g.*, Def. Exh. F, p. 135; Def. Exh. U (Tabs A-11, ¶ 17, A-17, ¶ 19).

(g) Title I teachers and other professionals are not to become involved in any way with the religious activities of the nonpublic schools and are not to introduce any religious matter into their teaching. Def. Exh. U (Tab A-4, ¶ 69).

64. An effective remedial educational program requires that the remedial teacher be aware of a student's response to his total educational environment. Title I teachers work with their students in groups of 10 or less, an educational setting which is quite different from the students' normal classroom environment. To understand how the student responds in the normal classroom environment, therefore, it is necessary for the Title I teacher to confer with the regular classroom teachers of the nonpublic schools concerning the students' needs and progress in that classroom environment. Such consultations are essential to an effective remedial education

program. *See, eg.*, Def. Exh. F, pp. 1-3. However, the Title I teachers are instructed to confine those consultations with regular classroom teachers to mutual professional concerns about the students' educational needs and not to engage in any discussion of matters of a religious nature. *E.g.*, Def. Exh. U (Tabs A-4, ¶¶ 68-69, 71; A-14, ¶ 16; A-36, ¶ 19).

65. There is no known instance of any Title I teacher or other professional becoming involved in the religious activities of nonpublic schools, introducing religious topics into his remedial instruction or counseling activities, or being pressured by nonpublic school principals or teachers to violate the explicit restrictions on the total separation of the purely secular Title I program and the religious functions of the nonpublic schools. The sole concern of the teachers and other professionals assigned to the nonpublic school Title I program is to provide a program of remedial instruction and services which is professionally comparable to that provided to students in the public schools of New York City. *See, e.g.*, Def. Exh. U (Tabs A-4, ¶ 70; A-25, ¶ 15; A-36, ¶ 22); Supplementary Affidavit of Lawrence F. Larkin ¶ 5.

H. *Supervision of Title I Professionals*

66. The Bureau of Nonpublic School Reimbursable Services has developed a comprehensive program of supervising, monitoring and evaluating the nonpublic school Title I program to ensure that Title I teachers and support professionals assigned to the nonpublic school program provide a quality program of remedial services and comply with all of the guidelines for that program, including the restrictions on their activities. Def. Exh. U (Tab A-4, ¶ 73).

67. Program supervision is the responsibility of the coordinators and supervisors of each of the five components of the nonpublic school Title I program. Def. Exh. U (Tabs A-4, ¶ 74; A-5, A-6, A-16, A-19, A-27, A-33, A-34, A-35).

68. The field supervisors serve essentially as itinerant evaluators and instructors of Title I teachers and other professionals at the nonpublic schools to which they have been assigned. A field supervisor is ordinarily responsible for 22 Title I teachers and attempts to make at least one unannounced visit to each teacher each month. Those visits will be more frequent for those teachers who are new to the program. *E.g.*, Def. Exh. U (Tabs A-4, ¶ 75; A-6).

69. During the unannounced visits, field supervisors evaluate the teachers' classroom performance, paying particular attention to the teachers' mastery of innovative remedial teaching techniques and familiarity with new materials and equipment. The field supervisors and teachers also discuss the problems and progress of particular students and the best way to deal with particular learning disabilities. This relationship between field supervisors and Title I teachers is highly professional. *E.g.*, Def. Exh. U (Tabs A-4, ¶¶ 76-78; A-6).

70. While the primary purpose of the field visits is to evaluate a teacher's performance and to provide an opportunity for consultation among peers, field supervisors are trained to be sensitive to the need for strict compliance by Title I teachers with those restrictions which are designed to achieve a total separation of Title I activities from the regular instructional programs of the nonpublic schools. Def. Exh. U (Tab A-4, ¶ 78). There is no known instance of Title I teachers and support professionals breaching those restrictions. *See generally* Def. Exh. U (Tabs A-5 to A-46); Supplementary Affidavit of Lawrence F. Larkin ¶ 5.

71. The affidavits of Title I teachers and support professionals uniformly attest to the fact that they are subject solely to the supervision of employees of the Board working in the nonpublic school Title I program. None has ever been subjected to any form of supervision by any nonpublic school employees. Def. Exh. U (Tabs

A-7 to A-15, A-17 and A-18, A-20 to A-26, A-28 to A-32, A-36 to A-46).

72. Program coordinators, who report directly to the Director of the Bureau of Nonpublic School Reimbursable Services, oversee the activities of the field supervisors. The coordinators are responsible for enforcing the general guidelines applicable to the nonpublic school Title I program and for ensuring that the program objectives are being met by the teachers under their direction. Coordinators will make occasional unannounced field visits to observe Title I teachers in the nonpublic schools. However, one of their principal methods of carrying out their responsibilities is through monthly in-service training sessions. Those sessions are frequently held on days when the public schools are in session but when the nonpublic schools have a religious holiday. The in-service training sessions permit the coordinators to review new techniques of remedial education and to review on a regular basis the guidelines for and restrictions on the nonpublic school Title I program. Def. Exh. U (Tabs A-4, ¶¶ 79-81; A-5, A-16, A-19, A-27, A-33, A-34).

73. Monitoring of the nonpublic school Title I program also is a function of persons outside of the supervision and control of the Bureau of Nonpublic School Reimbursable Services. For example, representatives of Chancellor Macchiarola's Monitoring Task Force and the New York State Education Department will periodically make unannounced visits to Title I classrooms to monitor the extent to which the program goals stated in the annual written Title I plan are being achieved. In addition, representatives from the United States Office of Education from time to time make inspection visits to the Title I classrooms. These monitoring activities provide an additional means for assuring that Title I teachers and other professionals are complying with the program guidelines and restrictions. Def. Exh. U (Tab A-4, ¶ 82).

74. Finally, the Board's guidelines require that an independent professional evaluator be employed annually to

review each of the Title I services provided to nonpublic school students. The evaluators examine the operation of the program and review test results to determine the effectiveness of the program in helping children to overcome learning disabilities. As part of their review, the evaluators visit Title I classrooms to observe how they are conducted. During the entire history of the nonpublic school Title I program, no evaluation report has contained any suggestion that Title I teachers deviate from the restrictions on their teaching activities or engage in any form of religious activity. Def. Exh. U (Tab A-4, ¶¶ 83-85); Supplementary Affidavit of Lawrence F. Larkin ¶ 5. The most recent written evaluation reports are for the 1979-80 school year and are included as Exhibits A to E to the Supplementary Affidavit of Lawrence F. Larkin.

I. *Title I Equipment and Materials*

75. A small portion of the budget for the nonpublic school Title I program is used annually to purchase materials and equipment necessary for teachers and other professionals to provide an effective remedial education program. For the 1981-1982 school year, only $570,344 was budgeted for materials and equipment. Supplementary Affidavit of Lawrence F. Larkin ¶ 10. The statute expressly contemplates that a portion of Title I funds will be used for such expenditures. 20 U.S.C.A. § 2734(a).

76. Some 95.3 percent of the instructional equipment and materials budget for the nonpublic school Title I program was allocated for the purchase of remedial teaching materials used by Title I instructors in their classrooms. These materials include dictionaries, consumable workbooks, textbooks, storybooks, teacher reference books, teaching games, standardized tests, measurement materials such as cuisenaire rods, rulers, and scales, capacity containers, metric learning tools, pictures, periodicals,

puppets, and audio-visual materials such as films, filmstrips, tapes, transparencies and recordings. Supplementary Affidavit of Lawrence F. Larkin ¶ 10.

77. The remainder of the equipment and materials budget was used for the purchase and rental of equipment. The equipment includes lockable storage and filing cabinets, desks, chairs, audio-visual equipment, tables, bookcases, duplicating machines, portable chalkboards, tape recorders, earphones, language master machines, and microfiche machines. Def. Exh. U (Tab A-4, ¶ 88).

78. All such materials and equipment are selected by the coordinators and supervisors of the five nonpublic school Title I programs on the standard requisition form of the Board's Bureau of Supplies. Def. Exh. G. The same procedures are used to obtain equipment and materials for regular public school classrooms and the public school Title I program. Def. Exh. U (Tab A-4, ¶ 89).

79. The various teaching materials used in the nonpublic school Title I program are selected on the basis of their relevance to the special needs of educationally disadvantaged or handicapped children. Def. Exh. U (Tab A-4, ¶ 90). Under the program guidelines, those materials must be appropriate for use in a remedial program and must not duplicate materials used in regular classroom instruction in the nonpublic schools. *E.g.*, Def. Exh. F, p. 136.

80. None of the teaching materials used in the nonpublic school Title I program has any religious content. In fact, many of those materials are designed to require a minimum of teacher direction to stimulate each student to work on his own toward improving his ability. The strictly secular content of the teaching materials and the emphasis on self-direction in the remedial programs virtually eliminates the possibility that religious content will find its way into the nonpublic school Title I program. Def. Exh. U (Tab A-4, ¶ 91).

81. Consistent with the Title I regulations, the Bureau of Nonpublic School Reimbursable Services has taken

steps to ensure that materials and equipment are used only in connection with the nonpublic school Title I program and will not inure to the benefit of nonpublic schools. *See* 34 C.F.R. § 76.661(c). All materials and equipment, at the time of acquisition, are clearly labeled as the property of the Board and as being for use in the Title I program. *See* Def. Exh. F, p. 351; Def. Exh. U (Tab A-4, ¶¶ 93-94). Title I teachers and other professionals are instructed that, when the materials and equipment are not in use, they should be locked in storage and filing cabinets. Def. Exh. U (Tab A-4, ¶ 95). Each item of equipment and material is subject to an annual inventory (*see* Def. Exh. J) and the Bureau of Nonpublic School Reimbursable Services makes follow-up inquiries when the inventory fails to account for specific items of equipment and materials. While the Board is empowered to terminate a Title I program at any nonpublic school at which Title I equipment and materials are diverted for use by the school in its regular instructional program, the Board has encountered no incident that has required it to exercise those powers. Def. Exh. U (Tab A-4, ¶ 98).

82. Under Title I and under regulations issued by the Office of Education and the Board, no Title I funds may be paid to nonpublic schools to finance salaries of regular classroom teachers or to construct nonpublic school facilities. 34 C.F.R. §§ 76.658, 76.622. The Board has consistently observed those restrictions. Def. Exh. U (Tab A-4, ¶ 99); Supplementary Affidavit of Lawrence F. Larkin ¶ 5.

J. *Title I Classrooms and Facilities*

83. Regulations issued by the United States Office of Education authorize the assignment of public school teachers to nonpublic schools "[t]o the extent necessary to provide equitable program benefits" to nonpublic school children. 34 C.F.R. § 76.659.

84. Pursuant to those regulations and for reasons explained more fully in paragraphs 100 through 109 below, the Board has determined as a matter of sound educational policy that Title I remedial and support services can be provided most effectively to eligible children only on the premises of the schools they regularly attend. For that reason, the Office of Special Projects, like its counterparts for public school children, assigns teachers to provide Title I services during regular school hours at the nonpublic schools attended by eligible students. Def. Exh. U (Tab A-4, ¶ 101).

85. Before the Office of Special Projects approves the assignment of Title I teachers or other professionals to a particular nonpublic school, an administrator of the Bureau visits the school to ensure that the facilities to be used for Title I instruction and support services meet all health and safety requirements of the Board. During those visits, the administrator informs the nonpublic school principal of all federal, state and local guidelines governing the Title I program, including the requirement that any room used for Title I instruction or support services be free of all religious symbols and artifacts. Def. Exh. U (Tab A-4, ¶ 102).

86. Nonpublic schools with children receiving Title I instructional services typically reserve a classroom for the exclusive use of Title I teachers. In those few nonpublic schools in which a Title I teacher spends five days a week, the Title I classroom is used only by that teacher. In the majority of the schools where several itinerant Title I teachers work from one to three days a week, the reserved classroom facilities are available for those teachers. Def. Exh. U (Tab A-4, ¶ 103).

87. With one exception, clinical and guidance professionals are itinerant, ordinarily spending only one or two days at any particular school. Those Title I staff members customarily use the nurse's room or a comparable facility at the nonpublic school. Those facilities are not used for any instructional purposes, and they provide

the necessary privacy for confidential discussions with students and parents. Def. Exh. U (Tab A-4, ¶ 104).

88. None of the nonpublic school facilities used for Title I remedial instruction or support services contains any religious statutes, symbols, pictures or artifacts. *E.g.*, Def. Exh. U (Tabs A-4, ¶ 105; A-10, ¶ 19; A-25, ¶ 21; A-31, ¶ 17). Those facilities are separate and distinct from the facilities used by the nonpublic schools for their own instructional activities. Typically, a Title I classroom has a hand-lettered sign on the door identifying it as a facility reserved for Title I remedial activities. *See, e.g.*, Def. Exh. F, p. 116. In effect, the Title I facility is a public school within the nonpublic school, unaffected by the fact that the nonpublic school may be sponsored by or affiliated with a religious denomination. Def. Exh. U (Tab A-4, ¶¶ 106-07).

K. *Administrative Contacts with Nonpublic Schools*

89. The day-to-day administration of the nonpublic school Title I program by the Office of Special Projects involves only routine communications with nonpublic school officials and does not involve the Office in the internal affairs of nonpublic schools. By the same token, those communications give nonpublic school authorities no control or authority over the internal decisions of the Office concerning the implementation of the nonpublic school Title I program. Def. Exh. U (Tab A-4, ¶ 115). The administrative relationships between the Bureau and nonpublic school officials fall into three general categories: disseminating information, processing requests for services, and resolving questions concerning the implementation of the program. *Id.* at ¶ 116.

90. To ensure that there will be full cooperation by nonpublic school officials, the Office of Special Projects makes it a practice to keep those authorites [sic] fully informed about the nonpublic school Title I program. In particular, the administrators of the Office disseminate

information to and hold orientation conferences for the nonpublic school principals about the following matters: the purpose of the Title I remedial education programs, the types of services available, the criteria for determining economic and educational disadvantage, considerations used in selecting those eligible students who receive services, the procedures for requesting services, the applicable guidelines for and restrictions on the program, and the policies and procedures for assigning Title I teachers and other professionals. Def. Exh. U (Tab A-4, ¶ 117). Most of that information is disseminated through conferences held at the Office, bulletins and newsletters sent by mail (see Def. Exh. L), and telephone calls between administrators of the Bureau and nonpublic school principals. Def. Exh. U (Tab A-4, ¶ 118).

91. The second type of administrative contact—processing requests for services—involves little more than a "paper relationship", in the sense that nonpublic school principals fill out, and employees of the Board review, two standardized forms. That process is substantially similar to that followed by public school principals in requesting Title I services for their students. Def. Exh. U (Tab A-4, ¶ 119).

92. Each spring the Board's Office of Educational Statistics sends to the principal of each of the 918 nonpublic schools in New York City a form entitled "Survey of E.S.E.A. Title I Eligible Non Public School Pupils." *See* Def. Exh. B. This form requests information concerning students' addresses, scores on standardized achievement tests and, in the case of handicapped children, the type of handicapping condition (such as mental retardation, visual impairment or deafness).

93. The Office of Educational Statistics uses the information on the survey forms to make a preliminary determination of which students are below the minimum competency level in their performance on standardized tests and who live in target public school attendance areas

with high concentrations of low-income residents. On the basis of those determinations, the Office of Educational Statistics prepares a roster of students who meet the threshhold [sic] eligibility requirements for Title I remedial services. A copy of those rosters is sent to the Bureau of Nonpublic School Services and nonpublic school principals. Def. Exh. U (Tab A-4, ¶ 121).

94. Those rosters permit the nonpublic school principals to complete a second form which is known as a "Request for ESEA Title I Central Remedial Services for Eligible Nonpublic School Pupils," and which is submitted to the Office of Special Projects. Def. Exh. C. These forms are submitted by the principals on behalf of students who are potential recipients of Title I remedial services and contain information about the extent of the students' performance below grade level in the areas of reading, mathematics and oral fluency in English. On the basis of that data, nonpublic school principals request a certain number of days per week of Title I remedial services in the five programs provided to nonpublic school students. Def. Exh. U (Tab A-4, ¶¶ 122-23).

95. After receiving the request forms from the nonpublic school principals, the Office of Special Projects allocates positions for teachers at the nonpublic schools on the basis of available funds, the total number of nonpublic school students who will actually receive services, and the administrative feasibility of assigning teachers or other professionals in light of the number of eligible participating students at particular nonpublic schools. Def. Exh. U (Tab A-4, ¶ 124).

96. The third type of administrative contact—resolving questions about program implementation—is primarily *ad hoc*. The questions directed to the Office of Special Projects most commonly relate to scheduling and related problems. Those questions never involve matters of a religious nature. Def. Exh. U (Tab A-4, ¶ 125).

97. In the course of these various administrative contacts between the administrators of the Office of Special

Projects and nonpublic school principals, the principals have occasionally criticized the Title I program. The most common criticisms have involved delays in implementing services at the beginning of a school year or delays in notifying the principals about the number of eligible students to whom the services will be provided in a particular year. None of these criticisms has ever involved allegations of interference by the Board or its personnel with the nonpublic schools' control over their internal affairs, curriculum, course content, or faculty qualifications or performance. Nor has there been any suggestion in those criticisms that the nonpublic schools were attempting to exercise any control over the nonpublic school Title I program or supervisory authority over teachers and other professionals assigned to that program. Def. Exh. U (Tab A-4, ¶ 114). Several principals of church-related schools at which Title I services are provided have submitted affidavits. Def. Exh. U (Tabs A-49 to A-54). In addition to giving a brief description of the schools, these affidavits describe the principals' perceptions of the Title I program as an independent form of secular remedial education for some of their students, as well as the relationship of their schools and themselves to the program and its administration.

98. The Office of Special Projects, as the agent of the Board responsible for implementing the nonpublic Title I program, is responsible for the welfare of all children participating in the program. On rare occasions, the Bureau has been required to exercise its power to terminate or suspend services to a small number of nonpublic schools which fail to comply with health and safety code requirements. In each instance that the power was exercised, the nonpublic school quickly remedied the problem and services were resumed. At no time has the Office terminated or suspended Title I services because of religious abuses or interference by nonpublic school officials with Title I teaching and supervisory activities. Def. Exh. U (Tab A-4, ¶¶ 126-27).

99. The experience with these various forms of administrative contacts between officials of the Board and administrators of nonpublic schools in New York City has confirmed the following observation by the United States Office of Education:

> "Title I creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school." *United States Office of Education (USOE) Program Guide No. 44* (1968), *reproduced in Title I ESEA, Participation of Private School Children, A Handbook for State and Local Officials*, U.S. Department of Health, Education and Welfare, Publication No. (OE) 72-62, p. 8 (1971).

L. *Reasons for On-Premises Services*

100. The Board made the decision to provide Title I instructional and support services to nonpublic school students at their schools during regular school hours only after experimenting with alternative programs. During the first academic year that Title I funds were available to the Board, the Board attempted to provide services to nonpublic school students after regular school hours both at public schools and at nonpublic schools. The experiment, in the Board's view, was a total failure. Def. Exh. U (Tab A-4, ¶ 135).

101. Within a few months of the enactment of Title I, the Board authorized a pilot Title I program for nonpublic school students. Initially, students selected for participation in the program were required to travel to public schools after regular school hours to receive remedial services from regular public school employees. When attendance lagged in that program, the Board transferred some Title I services to nonpublic schools after regular school hours, shifting the burden of transportation to the public school teachers, while maintaining

other services at off-premises sites. Attendance was also poor after that change was made, and the Board found common problems in both alternatives. Def. Exh. U (Tab A-4, ¶¶ 136-37).

102. Because both the off-premises and on-premises programs were conducted at the end of the regular school day, both the students and teachers were tired. The students' fatigue made them far less receptive to the highly intensive nature of remedial instruction, and they failed to show noticeable improvement in the skills in which they were deficient. Moreover, there was justifiable parental concern about the safety of children traveling home after dark or in inclement weather during the late fall, winter and early spring months. Finally, communication between Title I teachers and other professionals and the regular classroom teachers of the nonpublic school students was virtually impossible after the regular nonpublic school day ended. Def. Exh. U (Tab A-4, ¶ 136).

103. The only other alternative to a program on the premises of nonpublic schools during the regular school day was to offer Title I services to nonpublic school students at public schools during the regular school day. However, under Article XI, Section 306 of the New York State Constitution, there were serious questions concerning whether nonpublic school students could participate with public school students in programs conducted on public school premises during regular school hours. Because of those legal problems and because poor attendance in the after-hours programs had demonstrated that nonpublic school students were not receiving Title I benefits comparable in scope and quality to those received by public school students, the Board adopted the only practical alternative—a program on the premises of nonpublic schools during regular school hours. Def. Exh. L.

104. On August 31, 1966, the Board adopted a resolution approving that new method of providing Title I services to nonpublic school students. The Board's resolution and accompanying statement recited many of the

problems that had been encountered with the after-hours program as the reason for the new program. For example, the Board stated:

> "The Board's own experience in giving instruction of this character has demonstrated that the after-school centers are not as well attended as they should be by the students who need the most help. Moreover, the Board has learned by experience that remedial instruction by teachers specially assigned for the purpose should, to be as effective as possible, be carried on in frequent consultation with the regular class-room teachers of the children in question. Frequently, also, the children's records need to be looked at. All this would be difficult to manage in after-school centers, particularly when conducted on school premises other than the children's regular schools." Def. Exh. L, p. 3.

These and other reasons given by the Board for the failure of the after-hours program are remarkably similar to the findings of the Office of Education investigation team that provided the factual basis for implementing the Title I "bypass" program in four cities in Missouri. *See* paragraphs 21-27, *supra.*

105. In adopting the program in providing Title I services on the premises of nonpublic schools during regular school hours, the Board was sensitive to the restrictions necessary to ensure the secular integrity of the Title I program. For that reason, the Board was careful in selecting the types of services to be provided to eligible nonpublic school children. The Board's statement accompanying its August 31, 1966, resolution stated:

> "The Board . . . will provide the following services for educationally disadvantaged children in nonpublic schools, on their premises, during the school day: remedial reading, remedial arithmetic, speech therapy, and guidance counseling. The instruction

> will be given by peripatetic teachers, who will go from one school to another during particular periods; no teacher will be so assigned without his consent. The instruction will not duplicate any of the regular class-room work of the schools involved. Speech improvement instruction, for example, as distinguished from speech therapy (for stammering and other speech impediments), has been eliminated from the proposals as being too close to regular class-room work. Library services for non-public schools have likewise been eliminated as being outside the limited areas of remedial and therapeutic, and as constituting services to institutions more directly than to children." Def. Exh. L, p. 3.

Those criteria established by the Board in 1966 for determining the appropriateness of providing particular forms of services under Title I to nonpublic school students have been followed subsequently when new programs have been added for nonpublic school students. Def. Exh. U (Tab A-4, ¶ 40).

106. The necessity of providing Title I services to nonpublic school students on the premises of their schools during school hours is attested to in the many affidavits of Title I teachers, administrators, and parents submitted with this Narrative Summary. Included among the several pedagogical and practical reasons for the view specified in these affidavits are the need for consultation between the Title I teacher and the student's regular classroom teacher, the problem of student fatigue, receptivity, and attendance with respect to an after-hours program, and the problem of student security. *See, e.g.*, Def. Exh. U (Tabs A-5, A-13, A-18, A-21, A-30, A-34, A-35).

107. During the 1977-1978 school year, the Bureau of Nonpublic School Reimbursable Services analyzed the costs that would be incurred if the Title I program for

nonpublic school students were to be conducted at sites other than the nonpublic schools. Def. Exh. N. That analysis revealed the following:

(a) Using a random sample of six community school districts with 6,852 of the 33,977 eligible nonpublic school students, during the school year the survey concluded that 63 percent of those students would have to be provided transportation from their nonpublic school to the nearest convenient public school site. The cost of that transportation would necessarily have to come from that portion of the budget for the nonpublic school Title I program currently devoted to instructional services. Def. Exh. U (Tab A-4, ¶ 147).

(b) The cost of transportation, plus other non-instructional costs that would be incurred by the off-premises program, would amount to more than $4.2 million, which, for the 1977-1978 school year, would have been more than 42 percent of the total budget for the nonpublic school Title I program. Def. Exh. N.

(c) Because the Board could not have allocated an additional $4.2 million for the nonpublic school Title I program, those additional costs would have been met by that portion of the budget now devoted to instructional services. To meet those additional costs would have required the elimination of 167 teaching positions and a corresponding number of supervisory and other administrative positions. Such a reduction in professional staff would have meant the elimination of services to 5,039 students, or 36 percent of those who received Title I remedial services during the 1977-1978 school year. Def. Exh. N; Def. Exh. U (Tab A-4, ¶ 153).

108. An off-premises program that incurred non-instructional costs of $4.2 million and eliminated services to more than 5,000 nonpublic school students would not have been a program providing benefits comparable to those provided in the program of Title I services available to public school students in New York City. Def. Exh. U (Tab A-1, ¶ 16).

109. The conclusions of the study conducted by the Bureau of Nonpublic School Reimbursable Services parallel the experience of St. Louis, Missouri, during the 1975-1976 school year when it provided Title I services to nonpublic school students at five central locations after regular school hours. Those five central locations offered instructional services to 1,600 eligible nonpublic school students attending 23 nonpublic schools. That St. Louis Title I program for nonpublic school students incurred non-instructional costs of $286,181 out of a total program budget of $675,690. The noninstructional costs represented 42.5 percent of the total budget. Def. Exh. U (Tab A-4, ¶¶ 148-50).

110. Thus, the Board's own experience with an after-hours program during the first year that Title I was in operation and the magnitude of non-instructional costs that would be incurred by any form of off-premises program today demonstrate that there is no alternative to the present program of providing Title I services to nonpublic school students on the premises of their schools during regular school hours that would be comparable to the Title I services available to public school students in New York City.

M. *Accomplishments of the Title I Program*

111. During the 16 years that Title I services have been available in New York City, tens of thousands of economically and educationally disadvantaged nonpublic school students have participated in the program. Despite limited funds and rising costs, the Board has consistently attempted to assure that nonpublic school students would derive benefits from the program comparable to those enjoyed by public school students with similar economic and educational handicaps. Def. Exh. U (Tab A-4, ¶ 130).

112. Annual reports submitted by independent evaluators who have assessed the Title I program for nonpublic school students have consistently found that stu-

dents participating in the program show measurable improvement in overcoming their learning disabilities. The following is a summary from the reports for the 1975-1976 school year, *see* Def. Exhs. O to S, which describe the accomplishments noted by the evaluators who reviewed the nonpublic school Title I program:[1]

a. In the remedial mathematics program, the evaluator concluded that "the program was highly successful, well-administered and well taught . . . . In all grade levels, the students manifested statistically significant gains of their mathematics scores over the predicted scores." For example, only 26.32 percent of the students passed one test before receiving Title I remedial mathematics instruction. At a later time, however, 85.96 percent received passing scores on the same test. Def. Exh. Q, pp. 18, 22.

b. The evaluator of the reading skills center program concluded that "statistically significant improvement in reading achievement as measured by the Stanford Diagnostic Reading Test was evidenced by participants . . . . The individualized, diagnostic-prescriptive approach has resulted in clear and significant improvement for severely disabled readers in grades four through eight." Def. Exh. p. [sic] pp. 6-7.

c. The evaluator of the English as a second language program found that program to be "highly successful" and noted that "[t]est results for [the 3,000] participating pupils demonstrated that students at all grade levels experienced statistically significant gains." Def. Exh. R, p. 22.

d. The regular remedial reading program, which enrolled the largest number of students, received high grades from the evaluator. The evaluator stated that "[t]he major program objective, significant improvement

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[1] The most recent reports, which cover the 1979-80 school year, are marked as Defendants' Supplementary Exhibits A to E to the Supplementary Affidavit of Lawrence F. Larkin.

of reading levels over expectation, is judged to be unequivocally successful." Def. Exh. O, p. 8. The evaluator noted that students in 13 of 19 of the components of the program that he reviewed showed improvement in their reading abilities "at better than one month of reading gain for each month of instruction." *Id.* One of the major conclusions of the evaluator was as follows:

> "Implementation of the program, assessed through field visits, revealed that the program is a firstrate corrective reading effort, operating close to general program objectives and standards. There is an emphasis on individual diagnosis that is followed through with a corresponding emphasis on individual and small group instruction. The program is characterized by the presence of excellent prescriptive teaching, and imaginative and consistent efforts at motivation. A wide variety of materials are available and are in use, in conjunction with a wide range of appropriate teaching methodologies. The program has achieved a high level of student interest and involvement." *Id.* at 15-16.

e. The evaluator of the clinical and guidance program found that program to be successful in helping the students improve their skills in the instructional programs by overcoming their behavior problems. Test scores measuring behavior improvement were "highly statistically and practically significant." Def. Exh. S, pp. 15-16.

113. Parents of nonpublic school students receiving Title I services also attest to the substantial accomplishments of the Title I program. The affidavits submitted by several parents describe their children's achievements as a result of their participation in one or more of the Title I remedial educational programs and state that they could not otherwise afford to provide their children with these services. Def. Exh. U (Tabs A-55 to A-58).

III. CHARACTERISTICS OF CHURCH-RELATED SCHOOLS IN NEW YORK CITY AT WHICH TITLE I SERVICES ARE PROVIDED

114. The vast majority of nonpublic school students in New York City who receive Title I remedial services attend schools that are affiliated with one of several religious denominations. Statistics compiled by the Board reveal that approximately 85 percent of nonpublic school students receiving Title I services attend Roman Catholic schools affiliated with the Archdiocese of New York or the Diocese of Brooklyn. Approximately eight percent of participating students attend Hebrew Day schools.

115. Affidavits submitted by administrators of Catholic and Hebrew Day schools which have Title I remedial programs on their premises demonstrate that those schools do not have the characteristics of "pervasively sectarian schools" that have been involved in earlier cases in which the Supreme Court has considered the constitutionality of educational aid programs. Def. Exh. U (Tabs A-47 to A-54).

116. Those affidavits show that religiously affiliated schools attended by approximately 95 percent of nonpublic school students receiving Title I services:

a. do not restrict in any way the admission of students on religious grounds [Def. Exh. U (Tabs A-47, ¶¶ 27-31; A-48, ¶¶ 20-25; A-53, ¶ 7, A-54, ¶ 7)];

b. do not restrict the hiring of teachers on religious grounds [Def. Exh. U (Tabs A-47, ¶¶ 32-35; A-53, ¶ 10; A-54, ¶ 9)];

c. offer separate programs of secular and religious instruction and do not place religious limitations on the content of the instruction offered [Def. Exh. U (Tabs A-47, ¶¶ 36-40; A-48, ¶¶ 26-29; A-50, ¶ 7; A-53, ¶¶ 8, 9; A-54, ¶ 8)];

d. do not make any effort to compel their students to obey the doctrines and dogmas of the sponsoring church [Def. Exh. U (Tabs A-47, ¶¶ 21-23; A-48 ¶¶ 35-27 [sic])]; and

e. do not make any effort to inculcate students with or impose upon those students the religious values of the sponsoring church [Def. Exh. U (Tabs A-47, ¶¶ 24-26; A-48, ¶ 30)].

117. Those affidavits of the nonpublic school administrators also reveal that they consider the Title I remedial services offered to eligible students on their premises to be a program that is separate and distinct from the regular program of instruction sponsored by the nonpublic schools. Def. Exh. U (Tabs A-49, ¶¶ 12-19; A-50, ¶¶ 11-18; A-51, ¶¶ 12-20; A-52, ¶¶ 11-16; A-53, ¶¶ 15-21; A-54, ¶¶ 14-21).

118. Finally, the affidavits of the Hebrew Day School administrators disclose that the regular school day at those schools is much longer than normal and that a program of Title I remedial services offered at the end of that long school day would not be a practical alternative for students in those schools. Def. Exh. U (Tabs A-53, ¶¶ 8, 23; A-54, ¶¶ 8, 23).

Respectfully submitted,

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Aguilar, et al.*

Dated: May 12, 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 Civ. 1750

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON,
MIRIAM MARTINEZ and BELINDA WILLIAMS,
INTERVENOR-DEFENDANTS

PLAINTIFFS' COUNTER-STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Introduction

Plaintiffs have reviewed defendants' prolix statement of material facts not in dispute. We believe that the most efficient and convenient way for us to present out counter-statement is to respond to the defendants' statement, paragraph by paragraph.

1-15. Not in dispute.

16. Plaintiffs object to and dispute the allegations in paragraph 16 of defendants' statement through the word "institutions' [sic] in the fourth line of the paragraph as

argumentative, conclusory and unnecessary to the allegations in the balance of the paragraph, which are not in dispute.

17. Plaintiffs object to and dispute the allegations in the opening sub-paragraph of paragraph 17 of defendants' statement through the word "setting" in the second line of the paragraph, for the reasons stated in paragraph 16 above.

18. Plaintiff's object to and dispute the allegations in the first sentence of paragraph 18 of defendants' statement unless it is construed to mean that those allegations are requirements of the applicable statute and regulations, which the parenthetical references at the end of the sentence suggest.

19. Not in dispute.

21-27. Plaintiffs object to and dispute the allegations in paragraphs 21-27 of defendants' statement as irrelevant to the constitutional issue in this case, argumentative in nature, and, in the case of paragraph 27, improperly incorporating an entire report in a statement of facts not in dispute.

28-47. Not in dispute.

48. Plaintiffs object to and dispute the allegations in the first sentence of paragraph 48 of defendants' statement, to the word "Thus" at the beginning of the second sentence of the paragraph, and to the words "As a result" at the beginning of the third sentence of the paragraph, as being argumentative, conclusory and unnecessary to the statement of facts in the second and third sentences, which are not in dispute.

49-51. Not in dispute.

52. Plaintiffs object to and dispute the allegations in the last sentence in paragraph 52 of defendants' statement as improperly incorporating several affidavits in a statement of facts not in dispute.

53-56. Not in dispute.

57. Plaintiffs object to and dispute the allegations in the last sentence of paragraph 57 of defendants' statement as argumentative and conclusory.

58. Plaintiffs object to and dispute the allegations in the last sentence of paragraph 58 of defendants' statement unless it is taken to mean that there is no *report* of the type of instance referred to in that sentence that has been officially made to the New York City Board of Education, which is the most that can be said on the subject with any claim to personal knowledge of the facts.

59. Plaintiffs object to and dispute the allegations in paragraph 59 of defendants' statement for the reasons stated in paragraph 58 above.

60. Not in dispute.

61. Plaintiffs object to and dispute the allegations in paragraph 61 of defendants' statement as being argumentative, conclusory and patently unverifiable.

62-64. Not in dispute.

65. Plaintiffs object to and dispute the allegations in the first sentence of paragraph 65 of defendants' statement for the reasons set forth in paragraph 58 above. We object to and dispute the allegations in the second sentence of the same paragraph as argumentative, conclusory and unverifiable.

66-69. Not in dispute.

70. Plaintiffs object to and dispute the allegations [sic] the last sentence of paragraph 70 of defendants' statement for the reasons set forth in paragraph 58 above.

71. Plaintiffs object to and dispute the allegations in paragraph 71 of defendants' statement as improperly incorporating affidavits in a statement of facts not in dispute.

72-79. Not in dispute.

80. Plaintiffs object to and dispute the allegations in the last sentence of paragraph 80 of defendants' statement as argumentative, conclusory and a non-sequitur.

81. Plaintiffs object to and dispute the allegations in the first sentence of paragraph 81 of defendants' statement as vague, argumentative, conclusory, and unnecessary to the allegations in the balance of the paragraph,

which are not in dispute. We dispute the allegations in the last sentence of the same paragraph unless it is taken to mean that the Board has encountered no incident that *it has understood* to require it to exercise its powers.

82-82. [sic] Not in dispute.

84. Plaintiffs object to the allegations in paragraph 84 of defendants' statement as irrelevant to the constitutional issue in this case.

85-87. Not in dispute.

88. Plaintiffs object to and dispute the allegations in the second and fourth sentences of paragraph 88 of defendants' sentences of paragraph 88 of defendants' statement as contrary to the facts reasonably inferred from the record and by the use of common sense.

89-96. Not in dispute.

97. Plaintiffs object to and dispute the allegations in the last two sentences in paragraph 97 of defendants' statement as argumentative, conclusory and improperly incorporating several affidavits in a statement of facts not in dispute.

98. Not in dispute.

99. Plaintiffs object to and dispute the allegations in paragraph 99 of defendants' statement as argumentative, conclusory and improperly incorporating in a statement of facts not in dispute an opinion of an interest party on a material issue of fact.

100-110. Plaintiffs object to and dispute the allegations in paragraphs 100 to 113 of defendants' statement as irrelevant to the constitutional issue in this case.

114. Not in dispute.

115-117. Plaintiffs object to and dispute the allegations in paragraphs 115 to 117 of defendants' statement as contrary to the facts of record and as improperly incorporating affidavits in a statement of facts not in dispute.

118. Plaintiffs object to and dispute the allegations of paragraph 118 of defendants' statement as irrelevant

to the constitutional issue in this case and as improperly incorporating affidavits in a statement of facts not in dispute.

Dated: New York, New York
May 28, 1982

Respectfully submitted,

/s/ Stanley Geller
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

78 Civ. 1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

—and—

YOLANDA AGUILAR, LILLIAN COLON,
MIRIAM MARTINEZ and BELINDA WILLIAMS, ET. AL.,
INTERVENOR-DEFENDANTS

SUPPLEMENTAL
AFFIDAVIT OF
LAWRENCE F. LARKIN

LAWRENCE F. LARKIN, being duly sworn, says:

1. I am the Director of the Office of Special Projects of the New York City Board of Education. I make this affidavit in opposition to plaintiffs' motion for summary judgment and in support of defendants' cross-motion for summary judgment and to update the affidavit sworn to by me on April 17, 1979 and submitted to the court in the case entitled *National Coalition for Public Education and Religious Liberty* v. *California, et. al.*, 489 F. Supp.

1248 (S.D.N.Y., 1980). The April 17, 1979 affidavit is being submitted to this Court along with the rest of the documentary and testimonial record in the above case pursuant to a stipulation so ordered by this Court on March 12, 1982.

2. In 1979, my title was Director of the Bureau of Nonpublic School Reimbursable Services for the New York City Board of Education. I was responsible for overall supervision and management of the compensatory education services provided to New York City nonpublic school students by the New York City Board of Education under Title I of the Elementary and Secondary Education Act of 1965 (Pub. L. No. 89-10) ("Title I"). In my new position, I continue to bear day to day administrative responsibility for the City's nonpublic school Title I program as well as supervising additional special projects for the Board of Education.

3. I have carefully reviewed my affidavit of April 17, 1979. The Title I nonpublic school program described in detail in that affidavit is the same program which I administer today.

4. In the last three years there have been no changes in any aspect of the program including the type of services available, the Board's hiring and assignment policies, the guidelines for teachers, the method of supervision, the use of Title I equipment and materials, and the administration of the program. The only changes which have occurred are in the numbers of children, teachers and schools participating in the program and in the budget. These updated statistics have been incorporated into defendants' 9 (g) statement, "Defendants' Joint Statement of Material Facts not in Dispute." They will be described below.

5. Throughout the affidavit of April 17, 1979, I stated that in my eight years as Director of the nonpublic school Title I Program, I knew of no instance where religion played any role whatsoever in any aspect of the program. Today, three years later, I can again state that the Title I program is religiously neutral; I know of no instance in

which the decision to hire or reject a prospective teacher for the program was in any way influenced by the applicant's religious affiliation or beliefs; I know of no instance of any member of the Title I nonpublic school program staff becoming involved with the religious activities of the nonpublic schools, engaging in religious indoctrination in their teaching or counseling, or being pressured by nonpublic school principals or teachers to violate the explicit restrictions on the complete separation between purely secular Title I operations and the religious functions of the nonpublic school; I know of no evaluation report which has ever made a finding that Title I teachers have deviated from the explicit restrictions on their teaching activities; I have discovered no pattern of abuses of the restrictions placed on the use of Title I property; I know of no Title I room used for remedial instruction or support services at any nonpublic school which contains any religious statutes, symbols, pictures or artifacts; at no time have I been required to halt Title I services because of religious abuses or interference by nonpublic school officials with Title I teaching or supervisory activities.

6. As I stated in April 1979, to the best of my knowledge the operation of the Title I program in the nonpublic schools is similar in all material respects to the Title I program conducted on the premises of the public schools of the City of New York.

7. The pertinent statistics for the nonpublic school Title I program for the 1981-82 school year are as follows: Title I services are being provided to approximately 21,000 children attending 231 nonpublic schools, 84% of which are affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn. An additional 8% of participating students attend Hebrew Day Schools.

8. There are 532 employees in the program providing the following services: Remedial Reading, Reading Skills Services, Remedial Mathematics, English as a Second

Language, Guidance, and Clinical. In the 1981-82 school year, 78% of Title I teachers are itinerant in the sense that they spend less than five days a week at the same nonpublic school. Thus, children in 180 of the 231 nonpublic schools with Title I services receive those services from itinerant teachers. The average cost of a New York City teacher assigned to the nonpublic school Title I program for 1981-82 is $37,921.

9. The total Title I nonpublic school allocation for the 1981-82 school year is $20,003,028 which represents 13.5% of the citywide allocation of $147,850,892. Of the 302,382 public and nonpublic school children eligible for Title I services during the 1981-82 school year, 40,120 or 13.2% attended 316 nonpublic schools. (Because of logistical and budgetary problems, services cannot be provided to all eligible children.)

10. Materials purchased for the Title I program in 1981-82 cost $570,344. Of the total budget for instructional materials, 95.3% was spent on remedial teaching materials.

11. During the 1981-82 school year, the number of areas classified as "target" public school attendance areas was 561. A child must live within a target public school attendance area to satisfy the initial low-income prerequisite for Title I eligibility. In 1981-82, a target public school attendance area was one in which the percentage of needy children in the area amounted to 45.76%.

12. I am submitting with this affidavit independent evaluations of the Title I nonpublic school program for the 1979-80 school year. See Defendants' Supplementary Exhibits A-E. These evaluations show the progress made by the children in the program in improving their performance on standardized tests measuring basic educational skills.

13. In the Corrective Mathematics program the evaluator concluded, "Analysis of the pre- and posttest data for corrective mathematics students indicates that the

program had significant educational impact on pupils' mathematics achievement. The most striking gain in scores occurred in grade 1, where the average NCE gain was 24. (NCE stands for Normal Curve Equivalents, a score which expresses performance in relation to the performance of a nationally representative sample of students) . . . Observations of classrooms revealed that teachers were implementing the program according to its guidelines." Def. Supp. Exh. A, p. 33.

14. The evaluator of the Corrective Reading program stated: "In all grades, this program has had a positive impact . . . while the average performance of the group at pretest was far below the state's definition of educationally disadvantaged, (35th NCE) the group average at posttest exceeded that standard." Def. Supp. Exh. B, p. 5.

15. In the Reading Skills Center program, the children were found to have made "major gains" (Def. Supp. Exh. C, p. 4.) during their year in the program. The evaluator concluded, "On the average, students who took both the pretest and posttest gained 11 NCE's. Given that the State Education Department has set the gain of one NCE as the minimum criterion for programs to demonstrate significant educational impact, it can be concluded that pupils in this program have made substantial improvement in reading ability during the course of this year." Def. Supp. Exh. C, p. 30.

16. With regard to English as a Second Language, "all raw score means increased from pretest to posttest" during the 1979-80 school year and the evaluator stated that "The program achieved its stated objectives." Def. Supp. Exh. D, p. 2.

17. The evaluation of the Title I nonpublic school Clinical and Guidance program noted that although the "data on the academic performance of pupils does not separate the influence of the remedial instruction from the gains attributed to the Clinical and Guidance Program . . . the children receiving clinical and guidance

services do show NCE gains. This is commendable since these children, already receiving remedial services, were identified as having problems further affecting their academic performance." Def. Supp. Exh. E, pp. 4-5.

18. New York City's interest in this case transcends its desire to maintain one of the Board of Education's most successful programs. It is of primary importance to New York City that all children, whether they attend public or nonpublic school, reach adulthood with basic language and math skills. These skills are determinative of the ability to effectively participate in the economic and social life of the City. As New York City benefits from an effectively educated population it bears the cost of an educationally deprived one. In the past 15 years, New York City's on premises nonpublic school Title I program has served tens of thousands of economically and educationally deprived children. Yet, the record is bare of any instance of fostering of religious views. Based on defendants' submission to this Court, I urge that defendants' cross-motion for summary judgment be granted.

/s/ Lawrence F. Larkin
LAWRENCE F. LARKIN

Sworn to before me this
12th day of May 1982

/s/ Lorna Bade Goodman
LORNA BADE GOODMAN

Notary Public, State of New York
No. 4627573
Qualified in New York County
Commission Expires March 30, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, ET AL.,
PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION, ET ANO., DEFENDANTS

NOTICE OF CROSS-MOTION

ALLEN G. SCHWARTZ,
Corporation Counsel,
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Due and timely service of a copy of the
within
is hereby admitted.

New York, ...19....

.....
Attorney for

To
....., Esq.,
Attorney for

DEFENDANTS' SUPPLEMENTAL EXHIBIT A

OEE
EVALUATION
REPORT

FINAL EVALUATION REPORT

ESEA Title 1

Project Identification Number: 5001-64-01624

ESEA TITLE I
NONPUBLIC SCHOOL PROGRAM
CORRECTIVE MATHEMATICS SERVICES
1979-1980

Director:	Lawrence F. Larkin
Asst. Director:	Margaret O. Weiss
Coordinator:	Lucille Stovall

Prepared By The

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NEW YORK CITY PUBLIC SCHOOLS
Office of Educational Evaluation
Richard Guttenberg, Administrator

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I. *PROGRAM DESCRIPTION*

The Title I Nonpublic Schools Corrective Mathematics Services Program, hereafter called the Corrective Mathematics Program, served 8,547 nonpublic school students in grades 1 through 11 at 167 sites. Participating students were Title I eligible and required remediation in mathematics (six or more months below grade level). The goals of the program were: (1) to develop pupils' readiness for mathematics learning, (2) to improve pupils' development of mathematical concepts and (3) to increase pupils' achievement in computational and problem solving skills.

Instruction was given in small groups of five to ten students. Each group met two to five times per week for 35 to 60 minutes per session. Emphasis was placed on developmental and discovery techniques. The program provided reference materials, measurement materials, standardized tests, pupil workbooks and audio-visual materials.

The staff included one full-time equivalent (FTE)* coordinator, four FTE field supervisors, 87.4 FTE teachers and three FTE secretaries and/or clerks.

II. *DATA ANALYSIS*

Objectives And Tests Used

Grade 1. Students were to achieve gains in performance in mathematical concepts, as measured by the Stanford Early School Achievement Test, Level II, greater than would have been expected in the absence of treatment.

USOE Evaluation Model A1 was used to derive the "no-treatment expectation." Pretest raw scores were con-

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* FTE: Full-time equivalent; one FTE is equivalent to one full-time staff position. Some teachers in the program are hired on a part-time or per diem basis; therefore, the amount of teaching service is expressed in FTE's in lieu of reporting the number of teachers employed.

verted to Normal Curve Equivalents (NCE's), a type of score which expresses performance in relation to the performance of a nationally representative sample of students. Posttest scores were also converted to NCE's. It was assumed that, in the absence of treatment, the mean NCE of the group would be the same at posttest as at pretest.

An increase in mean NCE was interpreted as a gain in performance beyond what would have been expected without treatment.

Grade 2-11. Students were to achieve gains in mathematical computation, concepts, and problem solving, greater than would have been expected in the absence of treatment. These skills were measured by the Total Mathematics Score on the Stanford Achievement Test for Grades 2-8 and by the Total Mathematics score on the Stanford Test of Academic Skills (TASK) for Grades 9-11. USOE Model A1 was used, as above, to derive the "no-treatment expectation." A gain in mean NCE from pretest to posttest was interpreted as a gain in performance attributable to the program.

CHART I
TEST LEVELS AND FORMS, BY GRADE
FOR CORRECTIVE MATHEMATICS PROGRAM

GRADES	TEST LEVELS
Grade 1	SESAT, Level II
Grade 2	SAT, PRIMARY 1, Form A
Grade 3	SAT, PRIMARY 2, Form A
Grade 4	SAT, PRIMARY 3, Form A
Grade 5	SAT, INTERMEDIATE 1, Form A
Grade 6	SAT, INTERMEDIATE 2, Form A
Grade 7-8	SAT, ADVANCED, Form A
Grades 9, 10, 11	TASK, 1 Form A *
Grade 12	TASK, 2 Form A

* Although Level II was specified in the evaluation design, Grade 11 students were actually tested with TASK, Level I. Eleventh grade norms are unavailable for Level I, so that results are not reported for this grade.

Report and Analysis of Evaluation Results

According to the records kept, 8,547 students were served by the program. This evaluation reports on 7,896 students for whom both pre- and post-test data are available. Students were eliminated from analysis because of errors in data transcription, or because appropriate norms were unavailable. For example, all 11th graders in the program were tested with TASK Level I instead of Level II. While this test may have been more appropriate to their instructional level, NCE's have not been produced for 11th graders on this test and the data were not analyzed.

As the following table indicates, the program objectives were met in all eleven grades reported. Performance improvement is particularly striking in grade 1, where there was a mean NCE gain of 24. In grades 2 through 7, where program enrollment is concentrated, mean NCE gains ranged from six to nine.

Correlated t-tests were performed on the raw scores and NCE's for grades 1 through 10 and 12. All gains were statistically significant beyond the .001 level.

III. *SUMMARY OF SURVEY DATA AND TEACHER INTERVIEWS*

Introduction

A teacher survey provided data from 80 teachers who completed the questionnaire at a group meeting at the end of the school year. The survey was constructed based on responses from the teacher interviews, pretested, and revised by the Office of Education Evaluation (OEE) with assistance from the central Title I Nonpublic School Program administrators.

Interviews conducted with teachers and staff in 12 schools from May 29, 1980 through June 1, 1980 also provided evaluation data. Each site visit included an observation of the Title I instructional program and an interview with the teacher. The sites for the evaluation

CHART II

MATHEMATICS ACHIEVEMENT SCORES FOR STUDENTS IN CORRECTIVE MATHEMATICS PROGRAM, GRADES 1-12

	RAW SCORES		NCEs		MEAN GAIN
	Pre	Post	Pre	Post	IN NCE
Grade 1 Mean	21	43	27	51	24
N=77 Median	21	43	27	46	
SESAT LEVEL II					
Grade 2 Mean	31	45	30	36	6
N=1283 Median	31	45	30	34	
SAT, PRIMARY I					
Grade 3 Mean	44	68	28	35	7
N=1456 Median	44	68	27	34	
SAT, PRIMARY II					
Grade 4 Mean	36	57	30	38	8
N=1477 Median	35	57	29	38	
SAT, PRIMARY III					
Grade 5 Mean	41	60	31	36	5
N=1364 Median	40	60	31	35	
SAT, INTERMEDIATE I					
Grade 6 Mean	43	61	28	37	9
N=944 Median	42	60	30	37	
SAT, INTERMEDIATE 2					
Grade 7 Mean	36	50	28	37	9
N=547 Median	35	47	31	38	
SAT, ADVANCED					
Grade 8 Mean	43	56	30	36	6
N=324 Median	42	53	31	36	
SAT, ADVANCED					
Grade 9 Mean	23	28	33	41	8
N=287 Median	23	29	34	41	
TASK 1					
Grade 10 Mean	24	29	32	38	6
N=160 Median	24	30	32	39	
TASK 1					
Grade 11 Mean	15	19	*	*	*
N=71 Median	15	17	*	*	
TASK 1					
Grade 12 Mean	12	14	18	28	10
N=6 Median	12	14	19	26	
TASK 2					

* All 11th graders were tested with TASK Level I instead of Level II; appropriate norms have not been produced for 11th graders on Level I (See Page 4.)

were selected randomly from a stratified sample of schools in the Title I Corrective Mathematics Program. The interview form was also constructed, pretested, and revised by the Office of Educational Evaluation with assistance from the central Title I Nonpublic School Program administrators. The interviewer was trained in the use of the form by OEE staff and Title I nonpublic school personnel before conducting the interviews. The interviewed teachers were informed that the purpose of the interview was to provide information to the program coordinators and OEE. Teachers were assured that their responses would be reported and stored anonymously. The interviews ranged in length from 40 to 60 minutes; the average interview time was 49 minutes.

Information About Teacher Respondents

Teaching Experience. The survey data indicate that 6% of the 80 teachers had one to five years experience, 45% had six to ten years, 40% had 11 to 15 years, 4% had 16 to 20 years and 5% had more than 20 years teaching experience.

Of the 12 interviewed teachers, 50% had six to ten years teaching experience, 33% had 11 to 15 years experience and 17% had 16 to 20 years experience. No interviewed teacher had less than five years experience.

Teaching Experience in the Title I Corrective Mathematics Program. Of the surveyed teachers who responded to this question, 21% of the teachers indicated that they had one year of experience in the program, 2% had two years experience, 6% had three years, 6% had four years, and 61% had five years or more experience in the Corrective Mathematics Program.

Educational Background. The survey revealed that 9% of the surveyed teachers in the program have a BA/S degree only, 14% have a BA/S degree plus graduate credits and 76% have a MA/S degree.

The interview data show 17% had a BA/S degree plus graduate credits and 83% have a MA/S degree (in ele-

mentary education, guidance administration and supervision, history, or math education). Forty percent of those with graduate degrees have taken 30 graduate credits beyond their Masters degree.

Professional Development Activities. The surveyed teachers were asked about the professional development activities in which they had participated during the past three years. Their responses indicated that 65% had earned college credits, 16% had participated in non-Title I Board of Education workshops, 21% had taken UFT courses, all had participated in Title I * * *

* * * *

[Pages 8 and 9 of original document are illegible and have been omitted in printing.]

* * * cept development; 36%, attention problems; 31% poor self-images (including fear of failure), 29%, behavioral problems; 27%, problems from other achievement areas; and 16%, language problems.

The learning problem most frequently mentioned by the interviewed teachers was reading (75%). Other problems mentioned were poor conceptual abilities (42%); behavioral problems (33%); short attention span (50%); problems in listening to and following instructions (42%); language problems (33%); anxiety (17%); and problems at home (17%). Some teachers also reported specific problems with content materials such as: difficulty with word problems, difficulty in abstract thinking, and lack of basic mathematics facts.

Teaching Methodology

Major Areas of Focus. Major areas of instructional focus indicated by surveyed teachers were: learning of basic arithmetic facts, 79%; acquisition of computational skills, 79%; increasing problem solving ability, 95%; discovering number relationships, 79%; and forming generalizations, 56%.

All interviewed teachers named the learning of basic arithmetic facts and increasing problem solving ability as the major foci of instruction. Ninety-two percent of these teachers viewed acquisition of computational skills, discovery of number relationships, forming generalizations and fixing learning as the major foci of their instruction. Other responses included: conceptual development, 25%; geometry, 8%; thinking logically, 8%; and pratical arithmetics, 8%.

Time Allocation. Interviewed teachers were asked to estimate the time allocated to various instructional activities. Seventy-five percent of the teachers indicated that they spend between 50% and 75% of their time directing instruction to the entire group of an average of ten pupils. These interviewed teachers usually spent 25% of their time on individualized instruction (including monitoring pupils' work), and 10% of their time in formal and informal diagnosis. No interviewed teacher spent more than 10% of the time in discipline and housekeeping duties.

Motivation. The surveyed teachers were asked to identify the methods or techniques they used to motivate students; 91.2% checked games, 83.8% reported using manipulatives, 56.2% checked reward systems (stars, stamps, etc.), 36.2% indicated pupil self-evaluative techniques and 25% reported graphs for self tracking. The survey also asked the teacher respondents to check the most obvious pupil behavioral changes that resulted from the increased motivation. The responses were: 64%, more participation in Title I classroom activities; 39%, willingness to try more difficult materials; 39%, better self-image; 25%, greater rapport with the teacher; 23%, more attentive; and 16%, undertaking independent work.

All of the interviewed teachers indicated the use of games and/or manipulative-type materials as motivational techniques. The interviewed teachers also noted that students have trouble sitting still; it is, therefore, important that the students be involved in activities that allow for

movement. Some movement activities were a classroom store, drawing pictures, and making pancakes as a way of dealing with fractions. Forty-two percent of the interviewed teachers tried to coordinate learning objectives with real-life problems, stores and questions. Seventeen percent used a reward system (stars/stickers) as a motivational tool. Sixty-seven percent indicated that positive changes had occurred in the students' attitudes toward mathematics. Specifically, students were eager to come to class, they requested extra work, they became more confident in their abilities, and their self-image improved. In addition, 42% of the teachers reported a decrease in discipline problems and 25% reported an increase in class participation.

Peer Tutoring, Independent Study and Individualized Instruction. Forty-six percent of the surveyed teachers indicated their students were involved in peer tutoring and 64% indicated that their students were involved in independent study activities.

During the interviews, 67% of the interviewed teachers indicated their students were involved in some form of peer tutoring. This generally took the form of one child who had mastered a topic helping another child with related work. Eighty-three percent reported that their students participated in self-evaluation activities by checking their own work and answers. All but one of the interviewed teachers indicated their students participated in independent study. Twenty-five percent reported their students did independent study in the form of homework assignments, another 25% reported that they would give an independent study assignment to individuals who were performing at a level different from the rest of the class, and 33% said they sometimes gave students work to do independently such as math games, ditto sheets and puzzles. Only one interviewed teacher indicated that children were involved in longer term independent study activities involving several days work on a topic or project.

Pupil Assessment. Surveyed teachers were asked to specify items they used to assess their students' academic abilities at the beginning of a year and during the year. The following table summarizes their responses.

TABLE 1

Techniques used by Teachers (in percentages) to Assess Pupil Achievement at the Beginning and During The Year

Type of Assessment	Beginning of Year	During Year
Title I Program Assessment	19%	9%
An Informal Reading Test	2%	2%
A Standardized Norm Referenced Test	90%	60%
A Standardized Criterion Referenced Test	7%	26%
Teacher-Made Criterion Referenced Test	10%	26%
Conference with Classroom Teacher	20%	27%
An Informal Mathematics Test	20%	0%
Classroom Observation	0%	40%

Surveyed teachers were asked to name their two major uses of the results of the initial assessment: 65% mentioned evaluation of progress; 49%, individualization of instruction; 40%, organization of group work; lesson plans; 6%, teacher self evaluation and 2% indicated using the results of the assessment for diagnostic purposes.

All interviewed teachers indicated that they gave the Stanford Achievement Test for initial diagnosis and assessment of the students' achievement in mathematics. Fifty percent of the interviewed teachers also used teacher made instruments (criterion-referenced tests). In addition, the interviewed teachers said they used the regular classroom teachers' recommendations as part of their initial and on-going assessments.

Interviewed teachers used the initial pupil assessment as a basic tool for long range planning and for organizing the students in groups. The majority of the interviewed

teachers, 83%, also reported using this preliminary testing for individualizing instruction.

Half of the interviewed teachers stated that the Stanford Achievement Test was not an adequate diagnostic instrument because it was a multiple choice test. These teachers felt the students had an advantage because they could guess correct answers to questions on skills they had not yet mastered.

Eighty-three percent of the interviewed teachers indicated that they used the Spring, 1980, administration of the Stanford Achievement Test to reassess students' achievement. In addition, all of the interviewed teachers gave some type of teacher-made test, usually at the completion of a unit. All the interviewed teachers said that their primary method of reassessment was by observation of daily work; and they keep formal records of the skills the student has mastered. All interviewed teachers meet with the regular classroom teacher for additional information for reassessing pupils.

All of the interviewed teachers felt the informal and formal reassessments were important in the evaluation of each student's progress. Sixty-seven percent of the interviewed teachers responded that on-going reassessments helped them to individualized instruction; 67% reported that it aided in organizing group work and 50% used the assessments for short and long range planning. Additional responses were to provide input to parents, feedback to pupils, information for pupil self evaluations, and data to compare with the assessments made by the regular classroom teacher.

Student Records. All interviewed teachers kept records of attendance, test scores, pupils' progress, students' work, a checklist of skill mastery for each student, a record of classroom teacher conferences and notes from their meetings with the nonpublic school principals. Other records included progress reports, records of conferences with other Title I teachers and pupil related correspondence.

Related Duties. All of the interviewed teachers identified the following areas as duties related to teaching: administering standardized tests, diagnosing pupil needs, implementing instruction, participating in in-service conferences, preparing and maintaining lesson plans and pupil records, and confering with parents. Other responses included: preparing instructional materials, organizing classrooms, conferring with teachers and the principal, preparing progress reports, listening to student problems, helping with regular classroom mathematics, and planning the schedules.

Materials. All interviewed teachers found the materials to be appropriate for the pupils they taught. Teachers indicated that commercial materials were helpful and indicated a desire for additional ones.

All of the teachers indicated that the Title I Corrective Mathematics supervisory staff selected the materials they used in their classroom. However, 75% of the teachers said that they had some input into the selection decisions because they could recommend materials.

Support Services

Clinical and Guidance. The survey asked teachers to identify those staff members who referred pupils for clinical and guidance services; 91% checked the Title I Corrective Mathematics teacher; 85%, other Title I nonpublic school teachers; 83%, classroom teachers; 75%, principals; and 27%, parents. Nineteen percent of the survey respondents judged these services to be extremely effective; 26%, very effective; 39%, somewhat effective; 1%, not at all effective; and 9% indicated they did not know.

During interviews, all of the teachers said they referred children to guidance services. Other responses included were: recommendations from the regular classroom teachers (67%), other Title I teachers (42%), the principals (17%), and parents (8%).

The interviewed teachers had varying responses about the effectiveness of the clinical and guidance services. Twenty-five percent of the interviewed teachers felt that guidance services were extremely effective; 8%, very effective; 8%, effective; 42%, somewhat effective; and 8%, not effective at all. The predominant opinion was that effectiveness of the guidance services varied in quality from school, dependent on the specific guidance counselor.

Title I Central Staff. The survey asked teachers to indicate support services provided by the Title I Corrective Mathematics supervisory staff. The surveyed teachers noted supervisory visits, instructional supplies and audio-visual equipment.

All of the interviewed teachers indicated the Title I Corrective Mathematics supervisory staff supplied instructional materials, made supervisory visits, provided reference materials, made available audio-visual equipment, and conducted workshops.

Nonpublic School Principal. Eighty-five percent of the surveyed teachers responding to the questionnaire indicated that the nonpublic school principal provided orientation to school procedures. Sixty-two percent reported the principal arranged scheduling, 18% indicated the principal held monthly conferences and 16% checked that the principal arranged conferences with the regular classroom teachers. Most of the teachers interviewed found the principals to be cooperative and available when necessary. Eighty-three percent of the interviewed teachers reported that the principal encouraged coordination with the regular classroom teacher. Sixty-seven percent indicated that the principal also provided support in the areas of orientation to the school scheduling and pupil related conferences.

Parent Contact.

Number of Frequency. The data indicated that surveyed teachers met an average of 32% of the parents.

Teachers reported seeing some parents on a continuous basis, either weekly or monthly.

Interviews revealed that those teachers met with a range of 7% to 61% * of the parents of all the students they taught (See Table 2). The mean number of parents met per teacher was 30 (the range was from seven to 59). Thirty-three percent of the interviewed teachers had met with less than 25 of the parents (range for parents: 7%-20%); 42 with between 25 and 50 of the parents (25%-44%); 25% with more than half of the parents (51%-61%). No interviewed teacher met with more than 61% of their students' parents.

The number of parents met at each classroom site (see Table 2) ranges from zero to 59. The average number of parents met at any one classroom site was 14. Forty-four percent of the classroom sites in the sample had contact with less than 25 of the parents (0%-23%) range; 40% of the classrooms in the sample had contact with 25% to 50% of the parents, and 16% had contact with more than 50 (52%-75% range). No classroom site had contact with more than 75% of the parents. The interviewed teachers indicated that most of the meetings occurred informally either before or after school. The teachers noted that they had met 10% or fewer of the parents in a formal manner. Contact with parents seemed to be dependent on the proximity of the school to the home address. Contact was high when students walked to school and low when students were bussed in from far away. The interviewed teachers said that since most parents work, they are often unable to meet with their children's teachers.

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* This figure is based on the total number of parents for all sites that each teacher serviced.

TABLE 2

Percentage of Parents Met by Each Interviewed Teacher by Each School Site

SCHOOLS	TWELVE INTERVIEWED TEACHERS											
	1	2	3	4	5	6	7	8	9	10	11	12
School I												
Pupils Taught	40	40	60	96	19	62	26	100	20	82	43	60
Parents Met	13	5	10	59	3	18	5	25	8	50	10	45
Percentage	33%	13%	17%	61%	16%	29%	19%	25%	40%	61%	23%	75%
School II												
Pupils Taught	40	40		59	40	56			21		43	36
Parents Met	8	10		2	12	20			11		4	10
Percentage	20%	25%		3%	30%	36%			52%		9%	28%
School III												
Pupils Taught	19				20				40		19	
Parents Met	3				2				20		0	
Percentage	16%				10%				50%		0%	
School IV												
Pupils Taught									20			
Parents Met									5			
Percentage									25%			
Totals												
Pupils	40	99	100	96	98	102	82	100	101	82	105	96
Parents Met	13	16	20	59	7	30	25	25	44	50	14	55
Percentage	33%	16%	20%	61%	7%	29%	30%	25%	44%	61%	13%	57%

Only 16% of the interviewed teachers reported daily meetings with any parents; when this contact did occur it was informal (on the street, before or after school). An additional 33% of the teachers saw some parents informally on a weekly basis. Eighty-three percent of the interviewed teachers indicated contact with some parents every reporting period, 58% on a monthly basis, and 100% reported seeing some parents on a yearly basis (both formally and informally). (See Table 3.)

TABLE 3

Frequency of Parent Contact by Each Interviewed Teacher

	TWELVE INTERVIEWED TEACHERS											
	1	2	3	4	5	6	7	8	9	10	11	12
Number of Parents Met	13	16	20	59	7	30	25	25	44	44	14	55
# seen daily	0	0	*	0	0	0	0	0	0	30	0	0
% seen weekly	50	0	*	50	0	3	0	0	0	30	0	50
% seen monthly	50	0	100	75	0	3	0	0	0	30	20	50
% seen every reported period	80	100	20	100	100	5	0	100	100	95	50	0
% seen yearly	100	100	100	100	100	100	100	100	100	100	100	100

* Missing data.

Method. According to the survey, the most commonly reported means of communicating with parents was face-to-face (80%). Other means reported were by telephone (22%), by written communication (20%), and by parent/tutorial workshops (35%).

Interviewed teachers were also asked about the ways they communicated with parents. All of the teachers reported face-to-face meetings. Other methods included by telephone (83%), written communications (including written progress reports), and form letters.

Initiation. Seventy-nine percent of the survey respondents indicated that the Title I corrective mathematics teacher initiated the majority of teacher-parent contacts; 15% named the parents and 1% indicated the regular classroom teacher.

Ninety-two percent of the interviewed teachers identified the Title I teacher as initiating the parent-teacher contact. Eighty-three precent [sic] of the interviewed teachers stated that some of the parents also made the initial contact. Other reported responses included the classroom teacher (50%), pupils (33%), guidance counselors (17%), and principals (8%).

Classroom and Home Involvement. Ninety-two percent of the interviewed teachers reported having individual conferences with parents to discuss the students' progress. Over half of the interviewed teachers (58%) indicated that parents came to the classroom to observe. Again, the interviewed teachers reported that inadequate transportation for parents to the school hindered parental involvement activities. It was also reported that some parents had full time job obligations or were unable to help their child (e.g., because of language difficulties).

Teachers also reported ongoing articulation and communication with parents, both through homework assignments and through parental involvement in game playing and math activities.

Major Concern of Parents. According to the survey, teachers feel the major concern of parents was whether their children were performing on grade level.

All of the interviewed teachers indicated that the primary concern of the parents was their children's progress. Other major parental concerns, as assessed by interviewed teachers, including having their children reach grade level performance (58%) and whether or not the child would be promoted (50%). Other reported parental concerns included: behavior in the classroom (17%): other services available to the child (8%); how they as parents can help their child's achievement (8%); and removing the child from the regular classroom to attend Title I classes (8%).

Recommendations

Survey Results. The survey listed seven recommendations and asked teachers to check the one they considered most important. The results were:

36%—More teacher involvement in materials selection

33%—Fewer students seen more often

18%—More workshops based on Title I teacher input (re: teaching techniques)

5%—More opportunity for coordination with the classroom teachers

2%—No significant improvement is required

1%—More opportunity for coordination with the guidance counselor.

1%—More opportunity for coordination with other Title I personnel

General. General recommendations suggested by the interviewed teachers included: increase the frequency of instruction from twice a week to three to five times per

week (33%); decrease group size to permit more individualized attention (25%); more teacher involvement in materials selection (25%); more teacher exchange workshops (17%); change in the student eligibility rules so that those who are poor in math, but good readers can be included in the Corrective Mathematics Program, (8%); and increase guidance services (8%).

Staff Development. The most common recommendation was to have more workshops. Some suggestions for these workshops included a course on learning disabilities, making your own materials and model lessons. Other recommendations included more teacher-to teacher exchanges, and more teacher intervisitions.

Para-professional. Several interviewed teachers indicated that they would like to have a para-professional to help with individual pupils. All of the interviewed teachers with para-professional aides were very pleased with them.

It should be noted that para-professionals are employees of decentralized programs and as such are hired, supervised, and evaluated by community school district staff.

Para-professional staff when assigned by community school districts will, under the guidance of the Title I teacher: (1) work with the selected pupils on a one-to-one or small group basis on specifically planned activities geared to foster skills as diagnosed and taught by the Title I teacher; (2) assist with preparation of materials; and (3) assist with clerical and housekeeping tasks.

Pupil Selection. Seventy-five percent of the interviewed teachers recommended that students be placed in the program on the basis of their math disability only. Presently, the students must initially show disability in reading before becoming eligible for the Corrective Mathematics Program.

Coordination with the Regular Classroom Teacher. The Title I teacher confers periodically with the non-

public school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupil achievement and progress reports are reviewed with nonpublic school staff. Several interviewed teachers recommended more communication with the classroom teacher. Constitutional limitation and judicial decisions determine the extent to which Title I staff are involved in the nonpublic school instructional program.

Coordination with other Nonpublic School Title I Program Staff. Several interviewed teachers indicated that communication is a problem because the days the dfferent teachers are at the same site do not always overlap.

III. [sic] *CLASSROOM OBSERVATION SUMMARY*

Introduction

At each of the 12 sites visited, classroom observations were made the same day as the teacher interview. The classroom observation usually took two and one-half hours. Fifty percent of the observations were made in the morning and 50% in the afternoon.

Classroom Characteristics

Ten of the 12 classrooms were adequate in the categories of lighting, physical orderliness, space, ventilation, flexibility and freedom from external noise. Many of the classrooms were large and sunny and permitted an extensive display of teaching materials and student work. Of the classrooms found inadequate, one was on a poorly lit stage with poor ventilation. The space was shared with the reading teacher and thus provided little roon [sic] for math displays and/or math assignments. The other class met in the library, and that library was quite crowded. There seemed to be little blackboard space, and the math materials, although sufficient, were not readily accessible.

General Observations

A typical lesson was divided into three activities: (1) a game providing drill on a previously learned skill or the topic of the day; (2) a development lesson during which the teacher introduced a topic, many of these lessons included the use of manipulatives; and (3) a follow-up activity involving a pencil and paper task at which time the teacher provided for individual needs by circulating from child to child.

Teachers gave students immediate oral feedback through the lessons observed. Some teachers guided the children in discovering the algorithm while others tended to tell the children the process they should use. Developmental lessons in all classes included dialogue between the teacher and the students; there were no lecture classes.

Seventy-five percent of the teachers used manipulative materials during the observation period. Eighty-three percent of the teachers used games to reinforce and teach skills. All of the surveyed teachers used games and/or manipulatives. This observation is in keeping with the teacher interviews as well as the survey responses indicating that 91% of the teachers reporting using games and 84% reported using manipulatives. Twenty-five percent of the surveyed teachers used a discovery-type approach in their lessons and utilized a written or oral drill to reinforce skills. In addition, visual aids were observed in 17% of the classrooms.

Classroom Observation Checklist: Teacher

Other observations listed in Table 4, include the following: 92% of the teachers encourage children who work independently; one teacher insisted on group participation (8%). Ninety-two percent encouraged the children to work together; one teacher had prepared individual assignments for each child and did not encourage conversation among the pupils (8%). There were no social problems evident in any of the classrooms. Therefore, there was no opportunity to observe teachers solving social problems. All of the teachers worked with

the children, talked to them about their activities, helped children solve academic problems and encouraged children in their work. Twenty-five percent of the teachers were involved in pupil diagnosis/prescription during the observation period.

TABLE 4

Classroom Observation Checklist: Teacher

ACTIVITIES	# OBSERVED
Encourages children to work independently	92%
Encourages children to work together	92%
Talks with children about their activities for the instruction period	100%
Works along with children	100%
Helps children solve academic problems	100%
Helps children solve social problems	42%
Encourages/reinforces children in their work	100%
Gives feedback to children on their progress	83%
Pupil diagnosis/prescription	25%
General discussions with pupil(s)	0%
Individual pupil conference	0%

Classroom Observation Checklist: Children

Observations of the children were also made and summarized in Table 5. Children's work was visibly displayed in all classrooms. There were no classes in which groups of children worked independently or decided what activity they would engage in. Children spent time working independently in 83% of the classrooms.

TABLE 5

Classroom Observation Checklist: Children

ACTIVITIES	# CLASSROOMS OBSERVED
Work independently	83%
Work in small group independent of teacher	0%
Children decide what they will do (their plan is not limited to specific teacher conceived activities)	0%
Children's work is visibly displayed in classroom	100%

IV. [sic] *SUMMARY OF INTERVIEWS WITH PROGRAMS COORDINATOR AND FIELD SUPERVISOR*

Introduction

This section provides a summary of two separate interviews, one with the program coordinator and the other with the field supervisor. Both people have been involved with the program for 14 years. The proogram coordinator has been in that position for the entire 14 years and the field supervisor was a teacher in the program for five and one-half years and has served as the field supervisor for the past eight and one-half years.

Program Considerations

Goals. The primary goal of the program is to improve the mathematical ability of those children with diagnosed weaknesses in the areas of computation, mathematical concepts, and problem solving. The coordinator suggested that a hidden goal is to improve the children's attitude toward mathematics by creating an interest, eliminating fears and developing an appreciation of the idea that math is all around us.

In 1966, when the program began, the stated goal was to bring the children up to grade level. As the program evolved, it was discovered that the children had to be motivated and thus the hidden goal was conceived—to develop an interest and appreciation of mathematics. These goals were established by the program coordinator.

Strengths and Needs. The strengths of the program are centered in the small group size and the opportunity for individual attention; the supervisor added that the dedication and training of the staff was an asset; and the coordinator also emphasized the teachers' training in elementary mathematics. The coordinator pointed to the need for adequate time and space for staff development. The coordinator also suggested a special certification category for teachers of corrective mathematics. No

changes are presently anticipated; the program will continue as currently formulated.

Purpose of Program Assessment. The coordinator said that program assessments served for future planning and adjustment in the program as well as changes in teaching methodology. The supervisor added that the pupil assessments helped to gear the program toward the actual need of the individual child.

Instructional Considerations

Approaches to Instruction. The use of games and concrete manipulatives were emphasized. The coordinator focused on the use of technological developments such as computers and calculators. The supervisor mentioned an eclectic approach (audio-visual, manipulative, and the like) and a problem-solving approach using the various computational techniques.

Daily lesson. The supervisor outlined a standard lesson plan format consisting of a review of prerequisite skills, followed by a drill on the new or previous topics, a motivational activity presented as a question or a problem, and the lesson development. The final goal is to have the students apply their understanding of a particular concept or skill to the mastery of a new concept or skill.

Motivation. The coordinator and supervisor stressed that the use of colorful materials, a hands-on approach to learning arithmetic concepts, and the application of mathematics to everyday situations encountered by the child were the primary motivational techniques. No one textbook is prescribed, however, several textbook series are provided for teacher reference.

Overlap Between What is Taught and What is Tested. The corrective mathematics instructional objectives are more comprehensive than those measured by a standardized test. The coordinator stated that the instruction is based on weaknesses revealed by the pretest. The supervisor stated that teachers use the *New York City's*

Scope and Sequence, and *Minimal Teaching Essentials* and other New York City Board of Education publications.

Introduction of New Ideas/Approaches/Topics. The coordinator noted that during the last three years there has been an increase [sic] use of calculators as well as an increased emphasis on geometry at the elementary school level. The supervisor pointed out the new emphasis on the metric system. She also noted an emphasis toward a sensory (auditory, visual tactile) approach to instruction. The coordination of reading and math skills was also mentioned by the supervisor.

New ideas/topics/approaches are developed by the coordinator and the supervisor. The supervisor emphasized that they kept abreast of the newest methods and endeavored to adapt these to the Corrective Mathematics Program's teachers' and pupils' needs. New ideas/topics/approaches are taught to teachers during in-service workshops.

Student Considerations

Reporting of Students' Progress. The teachers discuss progress with the students daily. The supervisor reported that each student has a folder containing all of his work. The teacher also discusses the bi-yearly progress report with the student.

The parent receives two written progress reports on the child during the year. The supervisor added that parents are able to discuss their child's progress during formal and informal contacts with teachers at parent workshops.

The school principal is given a copy of each child's September and May Stanford Achievement Test scores. The supervisor also indicated that teachers maintain an on-going dialogue with the principal.

Retention of Students. Retention in the program was determined by two criteria; remaining on the eligibility list and failure to reach grade level performance.

Personnel Considerations

Supervisory Staff's Responsibilities. Informal field visits are made by the field supervisor to each teacher based on individual needs. A formal observation is made and forms the basis for a written report. Recommendations concerning teacher performance are discussed during post-observation conferences and through follow-up visits.

The supervisor mentioned that all supervisors and coordinators meet throughout the year and exchange input on the various Title I nonpublic school programs. The coordinator said that a supervisor might occasionally stop in to see teachers in other Title I programs in order to maintain inter-program communications.

Program Changes and Development. New methodologies and materials are first discussed at the supervisory level and then presented to teachers at workshops. Small groups of teachers are then asked to try the new methodology or materials for possible program-wide implementation.

Strengths and Needs of Instructional Staff. The coordinator and supervisor stressed the dedication of the teachers to the program, their qualifications, knowledge of the subject matter and their empathy for the children as the major strengths of the teaching staff.

In order to strengthen the instructional staff, the supervisor suggested the possibility of requiring an MA degree in remedial mathematics education for all future teachers. The coordinator stressed the need for a designated central program location and more time for staff training.

Recommendations

General. Both the coordinator and the supervisor stressed that pupils should be selected based on the mathematics disability alone and should allow inclusion

of children with good reading skills who are deficient in mathematics skills.

Staff Development. The coordinator suggested requiring special certification for Corrective Mathematics teachers. The coordinator also recommended making videotapes of master teachers available as a resource for the staff.

Materials. Both the supervisor and the coordinator stressed the importance of keeping abreast of new materials and adapting "useful" materials for the program.

Coordination with the Central Title I Program Staff. Both the coordinator and the supervisor felt that all Title I central staff work very closely together. No recommendations were made.

VI *EVALUATION CONCLUSIONS AND RECOMMENDATIONS*

Conclusions

Analysis of the pre- and posttest data for corrective mathematics students indicates that the program had significant educational impact on pupils' mathematics achievement. The most striking gain in scores occured [sic] in grade 1, where the average NCE gain was 24. This finding is worthy of further investigation. A major issue to address is: Are there specific instructional variables accounting for this gain? If specific instructional variables can be identified, the likelihood that they will be implemented in the following years will be increased.

Observations of classrooms revealed that teachers were implementing the program according to its guidelines. Furthermore, children were engaged in their lessons; all teachers provided encouragement and reinforcement to children at work.

Recommendations

Corrective mathematics teachers offered the following recommendations for program improvement: 1) fewer

students seen more often, 2) greater involvement in materials selections, 3) more workshops including a course on learning disabilities, making materials, and model lessons. In addition, 50% of the interviewed teachers felt that the Stanford Achievement Test was not an adequate diagnostic instrument, because the test items are multiple choice and hence, gave the student an opportunity to guess the correct answer. The evaluation team cannot fully assess the feasibility or desirability of implementing all of these recommendations. However, we do suggest that the program coordinator discuss these issues with teachers at staff meetings or during field visits.

One problem mentioned by both teachers and supervisors was the state mandated criteria for pupil selection. Pupils are selected for participation only if they are below grade level in reading as well as mathematics. Furthermore, 75% of the interviewed teachers mentioned that poor reading ability was one of the most common learning problems of their students. The evaluation team supports the program staff's concern with this issue.

An administrative practice worthy of praise is the manner in which instructional materials are selected for use. The materials are piloted on a sample of teachers to obtain their feedback before the material is considered for distribution system wide. We suggest that this practice be adopted in the other program components. In addition, the program coordinator recommended that video tapes be made of master teachers as a resource for the staff. Implementation of this suggestion would help to satisfy the teachers' desires for workshops focused on model lessons. Furthermore, it may cut down on the time needed for teacher intervisitations.

Finally the evaluation staff recommends that the effect of the tutor computer and the parent tutorial program be examined to determine the impact on pupil mathematics achievement.

DEFENDANTS' SUPPLEMENTAL EXHIBIT B

OEE
EVALUATION
REPORT

FINAL EVALUATION REPORT

ESEA Title I

Project Identification Number: 5001-64-01622

ESEA TITLE I
NONPUBLIC SCHOOL PROGRAMS
CORRECTIVE READING SERVICES
1979-1980

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I. *PROGRAM DESCRIPTION*

The Title I Nonpublic Schools Corrective Reading Services Program, hereafter called the Corrective Reading Program, served 11,789 nonpublic schools students in grades 1 through 12. The program, located at 212 sites served Title I eligible students (that is, pupils with below minimal competency in reading achievement). The goal of the program was to improve pupil's achievement in the areas of word attack, word knowledge, reading comprehension, writing and editing skills through remedial reading and writing instruction.

Instruction was given in small groups of ten pupils or less. Frequency of instructional sessions was determined by the pupils' achievement levels, severity of reading retardation, and school schedules. Pupils attended from two to five periods a week for 45 to 60 minutes per session.

The varied materials provided by the program included multi-media devices and conventional remedial reading materials (trade books, library books, work books). The staff included one full-time equivalent (FTE)* coordinator, two field supervisors, 121.2 FTE teachers and four secretaries and/or clerks.

This evaluation report is meant to report student achievement data; to describe program implementation from the teachers' and coordinator's perspectives; and to indicate directions for a more indepth evaluation during the 1980-81 year. [sic]

II. *DATA ANALYSIS*

Objectives And Tests Used

Readiness Level Grade 1. Students were to achieve gains in performance on three subtests of the Stanford

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* FTE: Full-time equivalent; one FTE is equivalent to one full-time staff position. Some teachers in the program are hired on a part-time or per diem basis; therefore, the amount of teaching service is expressed in FTE's in lieu of reporting the number of teachers employed.

Early School Achievement test greater than would have been expected in the absence of treatment. The three subtests were environment, letters and sounds, and aural comprehension.

USOE Evaluation Model A1 was used to derive the "no-treatment expectation". Pretest raw scores were converted to Normal Curve Equivalents (NCE's—a type of score which expresses performance in relation to the performance of a nationally representative group of students). Posttest scores were also converted to NCE's. It would be assumed that, in the absence of treatment, the mean NCE of the group would be the same at posttest as at pretest.

An increase in mean NCE was interpreted as a gain in performance beyond what would have been expected without treatment.

Grades 2-12. Students were to achieve gains in performance in reading comprehension greater than what would have been expected in the absence of treatment. Reading comprehension was measured by performance on the comprehension subtest of the Stanford Diagnostic Reading Test, 1976 edition, for Grades 2-8; and by performance on the comprehensive subtest of the Stanford Test of Academic Skills, for grades 9-12. USOE Model A1 was used, as above, to derive the "no-treatment expectation". A gain in mean NCE from pretest to posttest was interpreted as a gain in performance attributable to the program.

CHART I

TEST LEVELS AND FORMS, BY GRADE FOR THE CORRECTIVE READING PROGRAM

GRADES	LEVELS
Grade 2	SDRT, Red level, Form A
Grade 3, 4	SDRT, Green level, Form A
Grade 5-8	SDRT, Brown level, Form A
Grade 9, 10	TASK, Level I Form A
Grade 11, 12	TASK, Level II Form A

Report and Analysis of Evaluation Results

According to the records kept, 11,789 pupils were served by the program. Data were submitted for 11,782 students. This exaluation reports on 10,253 pupils in Grades 2-12, and 205 students in grade 1 for whom valid pre- and posttests scores were available.

CHART II

TEST SCORES FOR STUDENTS IN
THE CORRECTIVE READING PROGRAM, GRADE 1

SUBTESTS	Raw Score (mean) Pre	Post	NCE (mean) Pre	Post	Change in mean NCE
Aural Comprehension N=203	12	16	24	34	10
Letters and Sounds N=205	21	33	33	41	8
Environment N=202	17	21	23	34	11

CHART III
READING COMPREHENSION SCORES FOR STUDENTS IN CORRECTIVE READING, GRADES 2-9

Grades		Rae Scores Pre	Rae Scores Post	NCEs Pre	NCEs Post	Change in NCE
Grade 2	Mean	20	36	30	37	7
N = 1617	Median	18	37	31	38	
SDRT Red						
Grade 3	Mean	24	38	27	39	12
N = 1792	Median	24	39	28	39	
SDRT Green						
Grade 4	Mean	35	45	(31)	(38)	7
N = 1870	Median	37	47	32	37	
SDRT Green						
Grade 5	Mean	17	25	(27)	(37)	10
N = 1651	Median	16	24	30	38	
Grade 6	Mean	21	31	28	38	10
N = 1266	Median	20	31	30	38	
SDRT Brown						
Grade 7	Mean	26	37	30	38	12
N = 792	Median	26	38	32	38	
SDRT Brown						
Grade 8	Mean	31.8	42	30	41	11
N = 543	Median	33	45	31	43	
SDRT Brown						
Grade 9	Mean	22	30	16	24	8
N = 403	Median	22	30	17	25	
TASK Level I						

CHART IV
READING COMPREHENSION SCORES FOR STUDENTS IN CORRECTIVE READING, GRADES 10-12

Grades		Raw Scores Pre	Raw Scores Post	NCEs Pre	NCEs Post	Mean Gain in NCE
Grade 10	Mean	25	33	18	24	6
N = 205	Median	26	32	20	25	
TASK Level I						
Grade 11	Mean	20	28	10	23	13
N = 93	Median	19	27	7	23	
TASK Level II						
Grade 12	Mean	19.57	24	9	15	6
N = 21	Median	16	22	3	14	
TASK Level II						

In all grades, this program has had a positive impact. In grades 2-7, where the program is most extensive, the pretest mean NCE's ranged from 27 (percentile equivalent=14) to 31 (percentile equivalent=18), while the posttest NCE means range from 37 (percentile equivalent=27) to 39 (percentile equivalent=30). Thus, while the average performance of the group at pretest was far below the state's definition of educationally disadvantaged, (35th NCE), the group average at posttest exceeded that standard.

Correlated t-tests were performed on all raw scores and NCE's for each grade level. All gains were statistically significant beyond the .001 level. In general, this program serves a highly disadvantaged population, and appears to have had substantial impact on the group.

III. *SUMMARY OF SURVEY DATA AND TEACHER INTERVIEWS*

Data for the survey responses were collected from 98 reading teachers who completed the survey at a group meeting at the end of the school year. The survey was constructed, based on the responses from the teacher inviews, pretested, and revised by the Office of Educational Evaluation with the assistance from the Title I Nonpublic School Program administrators.

Data for the interview sections of this report were collected in twelve schools over a period of two and half [sic] weeks from May 22 to June 6, 1980. Each site visit included an observation of the Title I Corrective Reading class and an interview with the teacher. The sites for this evaluation were selected randomly from a stratified sample of schools in the Title I Nonpublic Schools Corrective Reading Program. The interview form also was constructed, pretested and revised by the Office of Educational Evaluation with assistance from the Title I central administrators. The interviewer was trained in the use of the interview form before the interviews began.

The teachers interviewed were informed of the purpose of the interview: to feed back information to the program coordinator for administrative and evaluative purposes. The teachers interviewed were assured complete confidentiality and anonymous reporting of their responses. Each interview took between 70 and 90 minutes. The mean interview time was 78 minutes. Some of the observations took place before the interviews and some of them were after the interview depending on the schedule of the teachers. In several instances the interview was started before the observation and completed after the classroom observation.

Information About Teacher Respondents

Teaching Experience. According to the survey results, 11% of the teachers had taught one to five years, 32% had taught six to ten years, 40% had taught 11 to 15 years, 2% had 16 to 20 years experience and 6% had more than 20 years teaching experience.

Interviewed teachers all had a minimum of five years teaching experience; 50% had six to ten years experience and 50% had taught for 11 to 15 years.

Teaching Experience in the Title I Nonpublic Schools Program. Teacher responses to the survey indicated that 15% had taught in the program for one year, 2% had taught for 2 years, 2% for three years, 7% for four years and 73% for more than 5 years.

Of the interviewed teachers, 33% had participated in the nonpublic schools program for one to five years, 58% for six to ten years, and 8% for 11 to 15 years.

Educational Background. Survey data reveal that 91% of the teachers have a MA/S degree and 9% of the teachers have a BA/S degree and graduate credits. All of the interviewed teachers have a MA/S degree in education.

Professional Development Activities. The survey asked teachers to check all the professional development activi-

ties in which they had participated during the last three years. The results were: 100%, Title I workshops; 67%, college credits; 42%, publishers' materials workshops; 40%, local and national professional conferences; 23%, other non-credit courses; 15%, UFT courses; and 13%, non-Title I Board of Education workshops.

During the past three years all of the teachers interviewed had been involved in some type of professional development: 42% of the teachers had participated in workshops, seminars, or had been actively involved in in professional organizations.

Pupil Profile

Number of Students Taught. The survey indicated that the teachers taught an average of 92 students per week. The number of pupils taught by each interviewed teacher ranged from 51 to 100; the average was 86. Thirty-three percent of the interviewed teachers met students at only one site, 50% at two sites, 8% at three sites and 8% at four sites.

Criteria for Selection. Interviewed teachers were asked to identify the criteria used for selecting pupils for the Corrective Reading Program. Ninety-two percent of the teachers indicated the criteria provided by the eligibility list were used for selection. Other responses included: severely disabled readers (83%), classroom teacher recommendations (50%) and principal recommendations (33%).

Participants in Selection. Survey respondents indicated that the following people participated in the selection process: Title I teachers (92%), the guidance counselor (44%) and other Title I teachers (29%).

All 12 interviewed teachers said the non-public school Title I guidelines were used in the selection of students. The teachers reported participants in these decisions included the Title I teacher (reported by 75% of the respondents), the classroom teacher (83%) and the school principal (75%).

Most Common Learning Problems. The survey listed eight learning problems and asked teachers to identify the three that most frequently interfered with student achievement. The responses were: 56%, limited oral vocabulary; 53%, general problems in concept formation; 46%, retention skills; 45%, attention problems; 45%, poor listening skills; 34%, poor self-image; 15%, behavioral problems; and 12%, problems in other achievement areas.

The 12 interviewed teachers mentioned an extremely wide variety of learning problems that interfered with achievement. Most frequently stated were poor inferential, conceptual, and/or critical thinking ability (75%); lack of vocabulary (50%); poor work attack skills (50%); lack of understanding main ideas (33%); and low self-esteem (25%). Additional problems mentioned related to specific reading or writing needs of the students, and poor study skills.

Teaching Methodology

Major Areas of Focus. Surveyed teachers were asked to check the major areas of focus of their instruction. The responses were: 91%, foster accurate total comprehension: 87%, development of flexible means of word analysis; 78%, development of writing techniques; 69%, development of language arts, skills and concepts; and 56%, study skills.

All 12 interviewed teachers responded that total accurate comprehension was a major focus of their instruction. All teachers interviewed also identified as major areas of focus: development and/or enrichment of language concepts: development of flexible means of work analysis; and development of writing techniques. Other areas of focus identified by relatively fewer teachers were better functioning in the classroom (33%), improvement of study skills (17%), enjoyment of reading (17%), higher self esteem (8%) and improvement of critical thinking skills (8%).

Time Allocation. The amount of time spent in different instructional groupings varied widely between teachers. All of the interviewed teachers spent at least some time on whole group instruction and some time on individual instruction. Forty-two percent of the teachers regularly spend time on small group activities. Even though the interview instrument did not specifically ask about it, three teachers mentioned that they have time for "sustained silent reading" in each class. Seventy-five percent of the interviewed teachers stated that they do on-going diagnosis throughout each class; therefore teachers had difficulty specifying a specific time allotment for diagnosis.

Motivation. Teachers responding to the survey were asked to identify the methods and techniques they used to motivate students: 75.5% used games, 68.8% used other pupil self-evaluative techniques, 53.1% used reward systems (stars, stamps, etc.), 28.5% used graphs for self-tracking and 28.6% used manipulatives. The survey asked teachers to identify the two most obvious behavioral changes that resulted from increased motivation. Their responses were: more pupil participation (54%); pupil willingness to try more difficult materials (45%); pupils know what to do without asking (30%); pupils are more attentive (20%); and pupils display greater rapport with teacher (21%).

Teacher interviews revealed that techniques and materials for motivating students varied widely, from "enthusiasm" to "treats". One teacher interviewed said her technique is "presenting it in a good way": another said, "I'm honest and direct. I tell the students if they do not work hard they are cheating themselves." A third teacher explained, "I present reading as a skill to make them brighter, as a desirable skill to have." Specific motivational techniques included asking questions (17%), reading stories aloud (17%), using the interests, experiences and writings of the children (50%), using things that happen in school (17%) or to the

teacher (8%), and integrating fun and novelty with lessons (25%). Specific motivational materials included pictures (17%), literature (17%) poetry (17%), newspapers (25%), television (8%), concrete objects (17%), colors (8%), games (17%), and teacher made tapes (8%). One teacher said her children wrote for free materials; another said she used a "problem box" to motivate students, encouraging "Dear Abby" interchanges. Twenty-five percent of the teachers said, "I'll use anything that catches their interests—everything", and one said, "I become an actress."

Teachers described changes they have noticed indicating increased motivation. These ranged from very general to very specific changes related to student behaviors, attitudes, and achievement. Changes related to student conduct included borrowing more books (33%), reading during Sustained Silent Reading time (17%), asking for more difficult work (8%), talking more about the books they are reading (8%), finishing work (8%), participating more in class (8%), and knowing routines (17%). Changes related to students' attitudes were: more enthusiastic—asking for more projects (8%); enjoying reading aloud (8%); anticipating coming to reading class (33%); liking to read what they write (8%); expressing feelings of competence (8%); acting more mature (8%); feeling self-confident (8%) and acting more attentive (17%). One teacher said the children are more eager to ask, "What are we going to do now?" more frequently. Changes related to student achievement were: writing more (8%); writing better (8%); reading simple vocabulary (8%); and general improvement in class work (17%).

Peer Tutoring, Independent Study and Individualized Instruction.

Survey responses to the question "Are your students involved in peer tutoring?" were: 38%, yes; 60%, no. Survey responses to the question, "Are your students

involved in independent study activities?" were: 79%, yes; 18%, no.

Eight of the 12 interviewed teachers stated that their students are involved in peer tutoring. One said that students read with one another; another teacher qualified her responses by adding, "I do it informally, not officially. Sometimes one child will help another."

Ninety-two percent of the interviewed teachers stated that their students are involved in self-evaluations.

Eighty-three percent of the teachers indicated that their students are involved in individual activities. Fifty percent explained that they give children individual assignments to do independently. One said, "After a whole group lesson, I usually give them individualized assignments to work on by themselves." One teacher described a contract system she had with fifth, sixth, and seventh graders in areas where she felt they needed reinforcement but not her direction.

Writing Skills, Survey Results. Ninety-one percent of the teachers reported using writing samples in connection with teaching writing. Seven teachers do not use writing samples. Those teachers reported that using writing samples was extremely effective (12%), very effective (44%), somewhat effective (35%), and not at all effective (2%). Teachers were asked if they could detect growth in any of three particular areas by reviewing their pupils' writing samples. Ninety-two percent indicated growth in sentence sense, 79% indicated growth in pupils' ability to express themselves, and 65% saw growth in the pupil's ability to write in longer units.

Writing Skills, Interview Results. Seventy-five percent of the teachers indicated improvement in a variety of areas—attitudes, criticial thinking skills, and general communication skills. Improvement was noted in the following areas: better appreciation for poetry and stories (17%), more awareness of spelling and punctuation (17%), and eagerness to read what they write (25%).

Seventeen percent of the teachers interviewed said teaching writing has helped students' critical comprehension and critical thinking skills. Twenty-five percent of the teachers said that the students are making connections between reading and writing and are seeing that writing skills (topic sentences, main ideas, details) are parallel to reading skills. One teacher indicated that teaching writing has helped her students become more verbal. Only two of the teachers stated that the teaching of writing has not affected the reading achievement of their pupils.

Time Allotment. Preferences for teaching writing varied from one hour once a week to ten minutes every other week. The great variation in teacher preference, in part, reflects their different teaching schedules. Some teach classes two days a week for an hour each, while others have classes once a week for an hour. Fifty-eight percent of the teachers indicated preference for ten to 15 minutes of writing activity daily. Twenty-five teachers preferred more time; 17% preferred less time.

The 12 interviewed teachers used writing books, activities, objects, literature, and commercial products to teach writing skills. Twenty-five percent of the teachers used *Spotlight on Writing*, 25% use *Writing Power*, 8% used worksheets, and another 8% said they get ideas from "idea books." The teachers described many activities including transforming and expanding sentences, making lists of adjectives, verbs and other parts of speech, listing synonyms and homonyms and writing beginnings and endings of stories.

One teacher focused on the practical, asserting that her students like filling out application forms and driver license forms. Another teacher taught outlining and two teachers used research to teach writing. Other ideas for ways to teach writing include: focus on creative writing by offering children ideas to write about; and involve children in sensory activities and ask children to write a description of another person for the other students to identify.

Some of the objects used to teach writing include pictures, posters, television, and newspapers. The teachers also incorporated poetry, literature, storytelling and singing. Several teachers had the children create stories and rexographed the stories for other students to read.

All the interviewed teachers said they diagnose writing skill needs based on the children's own writing.

Ninety percent of those interviewed indicated that their students had improved in sentence sense and in the ability to express themselves effectively. Forty-two percent reported that their students could write in longer units, and 33% noted that their students now write in shorter units, with fewer run-on sentences.

Public Assessment Instruments

Table 1 summarizes the surveyed teacher's responses on methods of pupil assessment.

TABLE 1

Percent of Teachers Using Various Assessments
At the Beginning of the Year and During the Year

Method	Used Beginning	Used during Year
1. Title I Program Assessment	55%	33%
2. An Informal Reading Test	60%	55%
3. A Standardized Norm Referenced Test	87%	54%
4. A Standardized Criterion-Referenced Test	21%	12%
5. Teacher Made Criterion-Referenced Test	32%	43%
6. Conference with Classroom Teacher	52%	71%
7. Informal Reading Test	3%	—
8. Classroom Observation	—	58%

Ninety-two percent of the interviewed teachers used the Stanford Diagnostic Test for assessment at the beginning of the year. Two teachers commented that they liked the test because it helps them "pinpoint problems

well." Additional measures used by teachers for initial diagnosis were Roswell-Chall (25%), Dolch Basic Word List (17%), SRA scores (17%) and Durrell or Gray Oral (8%). Informal diagnostic assessments included having the children read aloud (50%), reviewing the textbooks used by the children (8%), giving informal teacher-made tests (17%) and asking the child about the difficulties he was having (17%).

According to the survey, assessments were used in the following ways: individualizing instruction (90%), diagnosing pupil needs (64%), lesson planning (19%), organizing group work (16%) and evaluating pupil progress (8%).

The initial pupil assessment was used by all 12 interviewed teachers to individualize instruction and to plan long range lessons. There were exceptions to each case, however. One teacher said she individualized only phonics. One teacher said she did not have individual lessons because "most of the children need everything." Other purposes of the initial pupil assessment identified by teachers were: to organize group work (75%), to evaluate progress (50%) and to fulfill Title I guidelines (67%).

All interviewed teachers used formal and informal techniques to evaluate progress. Thirty-three percent of the teachers re-evaluated students once or twice a year, 17% of the teachers re-evaluated them three to four times a year and 66% re-evaluated much more frequently—8% every week, 25% every two weeks, 8% every month or 25% every six weeks. They used teacher made criterion referenced tests (25%), informal paragraphs and questions (25%), teacher made worksheets (17%), standardized tests (including Roswell-Chall, Gray Oral, Halsman Word Analysis and Durrell) (17%), and review tests and review tests from *Spotlight on Writing* (8%). Other evaluative tools used were: conferences with children (17%); writing samples (17%); close exercises (8%); workbook exercises

(8%); asking classroom teachers how children are doing (8%); daily worksheets (8%); and games.

Pupil reassessment was used by all of the interviewed teachers to modify and extend individualized instruction as well as group activities.

Student Records. All teachers kept records on tests, diagnosis, and parent conferences. In addition, they indicated that they keep records of assignments (100%), materials (92%), samples of students' writings (92%), attendance (92%), assessment checklists, on-going writing needs (83%), conferences with the guidance counselors (67%), conferences with the classroom teachers (58%), and intercomponent referrals (50%). Teachers also kept records of conferences with students, anecdotal records on each student, by-yearly progress reports, paraprofessional contacts, and teachers.

Related Duties. The interviewed teachers focused on the teaching aspects of their work and mentioned the related duties indicated in Table 2.

Materials. The survey responses indicated that 94% of the teachers felt that the materials in their classrooms were appropriate for the pupils they teach.

In interviews, 92% of the teachers reported the materials are appropriate and helpful. All 12 interviewed teachers reported that the Title I supervisory staff selected the materials for their use. Twenty-five percent of the teachers indicated that they helped in the selection of materials.

Support Services

Clinical and Guidance. The survey asked teachers to identify all those who referred pupils to the Clinical and Guidance Services; 96% of the teachers indicated the Title I teacher; 88%, classroom teachers; 82%, other Title I teachers; 82%, the principal; and 15%, parents. Survey respondents rated these services as extremely effective (14%), very effective (38%), somewhat effective (37%), not at all effective (1%) and don't know (6%).

TABLE 2

Teacher Duties and Activities
by the Percentage of Teachers Reporting Each Item

Duties And Activities	Percent of Teachers Responding
Selecting, screening and grouping of pupils employing standardized instrument measures of diagnosis and achievement.	100%
Diagnosing and prescribing to meet the needs of the pupils.	100%
Preparing and planning of long range instructional program to meet the pupils' needs and overcome weaknesses.	100%
Conducting the day-to day instructional program.	100%
Evaluating the strengths and weaknesses of the program as evidenced in pupil achievement.	100%
Conferring with parents and classroom teachers on the status of participants and on interchanges of suggested follow-up reinforcement activities.	100%
Referring participants to Clinicial and Guidance Services and the Reading Skills Center.	92%
Training students for tutor-tutorial program and training parents for the parent-turorial program.	42%
Planning and guiding the paraprofessional in conducting the activities in the reading classroom.	50%
Participating in on-the job training sessions and group training sessions.	75%

Ninety-two percent of the interviewed teachers indicated that the Title I teacher refers students to Clinical and Guidance services. Others identified by teachers as making referrals are the classroom teachers (42%), parents (8%), and the principal (8%).

Eighty-three percent of interviewed teachers described the Clinical and Guidance Services Program as very effective; 8%, as somewhat effective; and 8%, had no knowledge of the effectiveness: Several reasons were given in support of these evaluations: seeing a child when neces-

sary (50%); helping and/or visiting families (42%); making referrals for help (33%); arranging testing for students (25%); getting the child medical care (8%), and meeting with the teacher and principal (8%). One teacher said the guidance counselor has a "realistic approach to helping children in school situations". Seventeen percent indicated that the counselors follow-up problems and 25% reported that the counselors share information or offer advice to the teachers.

Nonpublic School Principal. Eighty-two percent of the survey respondents indicated the school principal provided orientation to the school; 61% reported that the principal arranged scheduling; 24% state the principal arranged monthly conferences and 14% that the principal arranged conferences with the regular classroom teachers.

When asked what kind of support they received from the nonpublic school principal, 50% of the interviewed teachers mentioned the principal's cooperation. When asked specifically about other kinds of help, teachers said they receive help with scheduling (83%), coordination (75%) and orientation (93%).

Title I Central Staff. Results of the survey item asking teachers to identify support services received from the central staff are:

96%—Supervisory visits

93%—Training/orientation

81%—Resource materials

78%—Ideas for new approaches

71%—Demonstration of administering and scoring tests

68%—Development of parent involvement activities

65%—Demonstration of test interpretation

64%—Selection of materials

64%—Aid in pupil diagnosis

62%—Aid in development of instructional methodologies

59%—Aid in selection/screening of pupils

When asked "What support services have you received from the Title I supervisory staff?", the 12 interviewed teachers were unclear about the time frame referred to because several of the listed services were provided at the beginning of the year while others are provided year long. Rsponses to questions about testing, diagnosis, pupil selection and prescription generally were qualified with "Yes, initially."

Ninety-two percent of the interviewed teachers indicated that the nonpublic school central staff provided training orientation, resource materials, and ideas for new approaches. Most of the teachers reported that the Title I central staff provided aid in pupil diagnosis (83%), development of parent involvement activities (83%), supervisory visits (83%), development of pupil prescriptions (75%), development of pupil prescription (75%), development of instructional methodologies (75%), selection of materials (75%), demonstration of administering and scoring tests (67%), and demonstration of test interpretation (67%). Forty-two of the teachers recognized the Title I supervisory staff as an aid in the selection and screening of pupils. In addition, teachers mentioned that they received monthly newsletters and a yearly evaluation.

Classroom Teacher. Surveyed teachers indicated the purposes for consultation with the regular classroom teacher as: assessing pupil needs and weaknesses, 85%; selecting pupils, 80%; coordinating scheduling, 72%; and motivating the interest of pupils, 42%.

All interviewed teachers consulted with the regular classroom teachers to assess pupil needs and weaknesses and to coordinate scheduling. Seventy-five percent of the teachers added that they use the consultations to find out

what the classroom teachers are teaching and/or coordinate lessons with the classroom teacher. Other purposes noted were discussions of pupil behavior and the sharing of test scores.

Parent Contact

Number and Frequency. The survey data indicate that the average number of parents met by the Title I Corrective Reading teacher was 36. The interviewed teachers met with 2% to 68% of the parents * of students they taught. The mean number of parents met was 33. Twenty-five percent of the teachers had met with less than 25% of the parents; 33% of teachers reported contact with more than 50% of the parents. No teacher saw more than 68% of the parents of the students taught. Parent-teacher contact varied from site to site. It should be noted that the teacher who serviced four schools had the least amount of parent contact. (See Table 3.)

Method. Surveyed teachers said their methods of communication with parents were face-to-face (65.5%), by telephone (12.6%), by written communication (36.1%) and by parent tutorial/workshops (17.6%). All of the interviewed teachers reported communicating with parents face-to-face. They also reported using other methods: telephone (75%); written communication (83%), and parent-turorials (17%). (See Table 4).

Initiation. Ninety-five percent of the surveyed teachers initiated the majority of teacher/parent contacts. Others who initiated contact included the regular classroom teacher (2%), the parents (2%) and the pupils (1%).

All of the interviewed Title I teachers initiated parent/teacher contacts. In addition, parents (67%), classroom teachers (42%), principal (98%), guidance counselor (8%) and one student (8%) have also initiated contacts.

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* This figure is based on the total number of parents for all sites each teacher serviced. See Table 3.

TABLE 3

Percentage of Parents Met by Each Teacher Interviewed by Each School Site

Schools	Twelve Teachers Interviewed											
	1	2	3	4	5	6	7	8	9	10	11	12
School I												
Pupil Taught	57	97	96	70	94	51	40	20	44	31	60	19
Parents Met	59	50	35	35	16	28	14	8	10	17	14	2
Percentage	78%	51%	36%	50%	17%	54%	35%	40%	22%	54%	23%	11%
School II												
Pupils Taught	14					39	57	40	43	20	40	29
Parents Met	6					14	19	32	15	15	5	0
Percentage	42%					35%	33%	80%	34%	75%	13%	13%
School III												
Pupils Taught								39				19
Parents Met								27				0
Percentage								69%				0%
School IV												
Pupils Taught												17
Parents Met												0
Percentage												0%
TOTAL												
Pupils Taught	71	97	96	70	94	90	97	99	87	51	100	84
Parent Met	45	50	35	35	16	42	33	67	25	32	19	2
Percentage	63%	51%	36%	50%	17%	50%	34%	68%	29%	63%	19%	2%

TABLE 4

Type of Parent Contact by Each Teacher Interviewed

	Twelve Teachers Interviewed											
	1	2	3	4	5	6	7	8	9	10	11	12
Total No. of Pupils for Each Teacher	71	97	96	70	94	90	97	99	87	51	100	84
Face to Face	20%	48%	36%	50%	16%	53%	34%	50%	29%	62%	19%	2%
Telephone		15%	1%		2%	11%	7%		1%	58%	5%	6%
Written Communication	2%	15%	6%	14%	6%	5%	9%	8%	12%	11%		
Parent/Turorial				17%	4%							
Other												

Classroom and Home Involvement. The interviewed teachers reported that, with the exception of individual conferences to discuss student progress (reported by all the teachers), very few parents have been involved in the Title I Corrective Reading classrooms. However, 33% of the teachers reported at least one instance where a parent had come into the classroom to observe.

The interview teachers said they had suggested ways in which the parents could become involved in work with the children at home. These suggestions included using worksheets, readers and flashcards, reading with the children or taking them to the library, using television as a learning tool, helping their children read labels with shopping, and conversing with their children.

Major Concerns of Parents. Eighty-four percent of the survey respondents reported that the parents' major concern was that their children approach grade level academic performance; 7% checked promotion as a major concern and 7% checked other concerns.

Teachers reported in the interviews that parents were primarily concerned about promotion (33%), grades (33%), test scores (8%), improvement in reading (25%), and pupil behavior problems (25%). Other concerns included the child not reading at home (17%) and objections to the books the child was choosing (8%). One teacher said the parents were curious about the program, wondered what the children were working on and why they were taken out of the regular classroom.

Recommendations

Survey Results. Teachers were provided seven recommendations for improving the Title I Corrective Reading Nonpublic Schools Program and asked to check the one they thought was most important:

55%—More Title I teacher involvement in materials selection.

30%—Fewer students seen more often.

6%—More workshops based on Title I teacher input (re: teaching techniques).

2%—More opportunity for coordination with the classroom teacher.

2%—More opportunity for coordination with other Title I personnel.

1%—No significant improvement.

0%—More opportunity for coordination with guidance personnel.

General. General recommendations made by the teachers for improving the Title I Corrective Reading Program were more training/workshops (33%), more participation in the selection of materials (25%), more time with the students than once a week (25%), smaller groups of students (17%), more supervisory people (8%), more contact with parents (8%), more contact with the classroom teacher (8%) and more supplies (8%).

Staff Development. Recommendations relating to staff development included a desire for intervisitations and suggestions for topics for workshops. Teachers would like more help in the diagnosis and remediation or writing difficulties, in working with students with limited language knowledge and in teaching vocabulary and comprehension. Other suggestions for staff development included participation in outside conferences, informal rap sessions about problems, and demonstration lessons by colleagues.

Materials. Recommendations relating to materials focused on selection of materials by the teachers themselves and on the desire for new materials and new ideas for using them. Specific requests were a weekly or monthly newspaper for students, skill development materials (as opposed to skill practice materials), study skills materials for fourth grade and higher materials for teach-

ing inferential thinking, writing, vocabulary books and new literature books.

Para-professionals. Seven of the 12 interviewed teachers were assisted by para-professionals this year. Three of the seven teachers said that these para-professionals were excellently prepared and that their services were valuable. Four teachers expressed concern about the preparation of para-professionals with whom they worked. It should be noted that para-professionals are employees of decentralized programs and, as such, are hired, supervised and evaluated by community school districts' staff.

Para-professional staff when assigned by community school districts have, under the guidance of Title I teacher: worked with the selected pupils on a one-to-one or small group basis, specifically planned activities geared to foster skills as diagnosed and taught by Title I teacher; assisted with the preparation of materials; and assisted with the clerical and housekeeping tasks.

Pupil Selection. Teachers recommendations included more flexible guidelines for the selection of pupils into the program. For example: half of the teachers said a child cannot get help if he lives one block outside the prescribed area.

Coordination with the Regular Classroom Teacher. The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupils achievement and progress reports are reviewed with nonpublic school staff.

Teachers suggested that there should be even more conferences with the regular classroom teachers. It was also suggested that invitations should be extended to the Title I teachers to attend the nonpublic school faculty meetings.

It should be noted that constitutional limitations and judicial decisions determine the extent to which Title I staff are involved in the nonpublic school instructional program.

Coordination with Title I Program Staff. Recommendations concerning coordination with other Title I Program staff focused on the desire to be scheduled in a school when other Title I teachers and/or the guidance counselor are there. Some teachers suggested that meetings be scheduled for all the Title I staff in a particular school.

Sixty-seven percent of the teachers offered praise for the program. This praise was unsolicited. Some teachers commented that the newsletter was very helpful; one said, "I've taken a lot of ideas from it." Some teachers indicated that the training was thorough and others reported that the training in writing in particular was helpful. The materials were also praised and several teachers commented favorably on the organization of the program.

IV. *CLASSROOM OBSERVATION SUMMARY*

Introduction

The classroom observations were made on the same day as the teacher interview at each of the 12 sites visited. Classroom observations varied in time from 45 minutes to 95 minutes. The mean observation time was 63 minutes. Five observations (42%) took place in the morning and seven (58%) took place in the afternoon. The earliest started at 8:45 a.m. and all observations were completed by 2:25 p.m.. The lessons observed lasted from 45 to 70 minutes. The class size varied from five students to 11 students: the grade level of the classes ranged from first grade holdovers to ninth graders.

Classroom Characteristics

Most of the classrooms were large, bright and airy. All of the 12 classrooms had adequate lighting and were

orderly. Ten classrooms were free from external noise; however, in one classroom, loud noise came intermittently from an elevator which opened directly into the room and, in another classroom, an elevated train periodically passes outside the window. All but one classroom had adequate space, ventilation, and flexibility. The exception was a room that was formerly a storage closet (approximately 8′ x 16′). It had no window; students had to stand up to allow others to move into their seats. There was limited space for materials; twice during the observation, boxes of materials fell from the place where they were balanced. All of these conditions interfered with the instruction in the classroom.

General Observations

All of the teachers devoted part of the time to whole group instruction and part of the time to individual work. This is in line with the teacher reports of activities in their classrooms. (See page 6 of this report.) Over half of the observed teachers included small group work in their lessons, 58%, and 42% of the teachers were observed allowing time for sustained silent reading.

No teacher was observed teaching phonetic or word analysis skills to the whole group although several worked with individuals on phonics. Sixty-seven percent of the teachers taught comprehension skills which required recalling details and the sequence of a story, finding the main idea, drawing inferences, and predicting outcomes. One teacher asked children to answer questions about a story. Seventy-five percent taught grammar or language arts lessons including nouns and verbs, comparatives, synonyms, new vocabulary, concrete vs. abstract words, collective nouns, categorization of words, and solving riddles. Eighty-three percent of the teachers integrated some writing activity in their lessons. Observed writing activities involving composition included: writing sentences using words from given lists, rewriting the last line of a poem, rewriting a story, com-

posing a party invitation, writing four sentences beginning with a certain phrase, and writing a description of chocolate candy. All of these observations were in keeping with the teachers' stated foci of instruction: to foster accurate comprehension, to develop and/or enrich language concepts, and to develop writing techniques.

Two teachers used microfiche machines, two used tape records, two used the Language Master and three used games to reinforce skills. At least one of the motivational techniques named in the Motivation Section under TEACHER METHODOLOGY of this report (page 7) was observed in use in all of the classrooms.

Table 5 lists the observed teacher activities. All of the observed teachers talked with the children about their activities, encouraged and reinforced children in their work and gave feedback to children on their progress. The evaluator observed that 92% of the teachers helped children solve academic problems and engaged in general discussions with the pupils.

Observation Checklist: Teacher

Eighty-three percent of the teachers were observed encouraging children to work independently, 83% were involved in pupil diagnosis and/or prescription and 83% held individual pupil conferences. The evaluator also observed 67% of the teachers encouraging children to work together, 42% working along with the children, and two teachers helping children solve social problems that arose. (See Table 5.)

Observation Checklist: Children

In all the classrooms children worked independently and in all but one, the children's work was visibly displayed in the classroom. In 50% of the classrooms, children worked in small groups independent of the teacher and in 17% of the classrooms children themselves were able to decide what they would do. No overt non-social behavior was observed in any of the classrooms.

TABLE 5

Classroom Observation Checklist: Teacher

Activities	% of Teachers Observed
Encourages children to work independently	83%
Encourages children to work together	67%
Talks with children about their activities for the instruction period	100%
Works along with children	42%
Helps children solve academic problems	92%
Helps children solve social problems	17%
Encouraging/reinforcing children in the work	100%
Gives feedback to children on their progress	100%
Pupil diagnosis/prescription	83%
General discussions with pupils(s)	92%
Individual pupil conference	83%

TABLE 6

Observation checklist: Children

Activities	% of classrooms Observed
Work independently	100%
Work in small groups independent of teacher	50%
Children decide what they will do (their plan is not limited to specific teacher conceived activities).	17%
Overt non-social behavior	0%
Children's work is visibly displayed in classroom	92%

V. *SUMMARY OF INTERVIEWS WITH PROGRAM COORDINATOR AND FIELD SUPERVISOR*

Introduction

The interviews with the program coordinator and the field supervisor revealed that these administrators were in close agreement with one another in the areas of theory and practice. The backgrounds of the two people in relation to the program are very different: The coordinator has been involved with the Nonpublic School Title I Corrective Reading Program since its inception fourteen years ago; the field supervisor has been working with the program for only five months. Their responses are reported together when the two agree; when they disagree, their responses are differentiated.

Program Considerations

Goals. The goals of the program are (1) to raise reading levels as measured by a standardized instrument, (2) to help develop an awareness and love of recreational reading, (3) to assist the pupils to function better in their classrooms, and (4) to prepare pupils in content areas. The goals were developed through the identification of pupils needs within the nonpublic schools and approved by the State Education Department. There is now a greater focus on comprehension and writing skills.

Strengths and Needs. The greatest strengths of the program were identified as the diagnostic-prescriptive approach, individualization, small groups in which the teacher can isolate weaknesses and build on strengths, the close relationships a teacher has with her pupils, and the opportunity to create an environment where children have successful experiences. Individualization is possible because the teachers meet with small groups of pupils and have many varied materials.

> The materials are selected for interest as well as readability. We try to develop within the child the responsibility of becoming responsible for his/own learning. To facilitate this we give him the opportunity to do the things he can't do in his own classroom, the use of the materials that are more interesting, and more stimulating and access to audio-visual machines.

When asked what parts of the instructional program are in need of strengthening, the program coordinator replied:

> We have a dearth of supervisors. The feedback to the teachers is not as good as it should be. We need additional field supervisors to provide on-site training and support.

The program coordinator also stated:

> I would guess the teachers are uncomfortable with teaching writing. They are good at teaching decoding; they can always use new ideas to teach comprehension. I would recommend greater concentration in developing writing skills and new and different approaches to teaching comprehension skills. More time to let children read in the classroom should be built into the program.

The program coordinator indicated she would also like to see more input by teachers into the development of the curriculum and the program; she indicated that this was an area that was presently being improved and where changes are planned.

Purpose of Program Assessment. Program assessments are primarily used for diagnosing individual and group needs. They are also used for planning and for program evaluation.

Instructional Considerations

Approaches to Instruction. A wide variety of approaches to instruction are utilized, but the primary approach is diagnostic-prescriptive.

A wide variety of materials are made available to teachers, including phonetic materials, linguistic materials, audio-visual equipment and materials, language experience materials, and materials for developing comprehension through a variety of approaches. Teachers are trained to select materials appropriate for a particular child, or group.

Daily Lesson. Each lesson should include large group, small group and individualized instruction. Within that framework there should be a language development lesson, a writing lesson and uninterrupted Sustained Silent Reading. Within each of these areas, the teacher may elect to teach a comprehension skill or a writing skill.

Motivation. Motivating methods and techniques are determined by the particular teacher. The coordinator stated, "We can suggest a multitude of techniques, but the teacher selects the particular technique that is motivating for each child." The supervisor, in addition, said that the students also realized "they're here to get help, and they try to get it."

Overlap between What is Taught and What is Tested. The field supervisor stated that there is considerable overlap between what is taught and what is tested in vocabulary, comprehension, and phonetic and structural analysis. She has observed this overlap on her site visits and by looking at plan books. She added that one area the Stanford Test does not evaluate is writing skills.

The program coordinator said that teachers do not teach specifically to the test; rather, they teach reading skills based on the diagnostic-prescriptive approach. She stated, "Of course, this will hopefully create growth and the pupils will hopefully perform better on the standardized tests." This has been the case, she stated, since the evaluations do indicate that pupils demonstrate

growth in reading. "But," she added, "our goals are larger than just achieving on standardized tests."

Introduction of New Ideas/Approaches/Topics. Within the last three years, there has been more focus on the total reading process, on the schema approach and on psycholinguistics. This year writing has been introduced both as a complement to teaching reading and as a goal in itself.

These ideas/approaches/topics were introduced to the teachers in large group conferences and/or small group meetings on days when the nonpublic schools were not in session. In addition, a monthly newsletter is published, resource materials are available to teachers in the office, and field supervisors make on-site visits to help teachers to become aware of and implement new ideas.

Student Considerations

Report of Students' Progress. Progress is reported to students through informal conferences that take place at least once every two weeks. The frequency of these conferences depends on the school, the teachers and the child. The tone of the conference is not formal but rather, "You mastered ————, now let's go on to ————."

Written progress reports are issued to the parents twice a year. In addition, parents are invited to the school to talk with the teachers. In some schools, parent workshops give parents an overview of what is being taught.

Communication between the teachers and the principals is encouraged. The principals must see and sign all the reports to the parents (issued twice a year). They also receive test scores for each group. In most schools the principals also have informal conferences with the Corrective Reading teachers.

Retention of Students. Student eligibility is determined by virtue of their residence in a target area and by the degree of their reading retardation. When students achieve grade level they leave the program. If they are not on grade level, they are retained. A classroom teacher

or principal may request that a child leave the program for any reason, but this is infrequent. "On the rare occasions when a parent requests a child's removal from the program, we comply," the coordinator said. At this point there is no limit to the number of years a student can remain in the program.

Personnel Considerations

Supervisory Staff Responsibilities. On-site visits provide the basis for teacher evaluations. The supervisor visits the classrooms and observes lessons. After each observation the supervisor makes suggestions, discusses any problems, and may demonstrate the use of new materials, or demonstrate a lesson. Formal observations are followed by a conference and then by a formal observation report which is maintained in each teacher's file.

Teachers are informally observed as frequently as possible. With new, inexperienced, and/or weak teachers, the observations were more frequent than with other teachers.

Observations of unsatisfactory teaching are followed by feedback to the teacher immediately after the lesson. The supervisor stated, "where we have a weak teacher, the frequency of visits is increased, the coordinator is made aware of it, oral and written suggestions are given to the teacher and follow-up observations are made by the supervisor.

The coordinator said, "Contacts among Title I teachers in various components are difficult because they are rarely in the same place at the same time. However, we have joint programs planned by the staff. We may invite the guidance counselor to a Corrective Reading Workshop, and a math and reading booklet was jointly published at Christmas."

The coordinator stated, "The supervisory staff meets with the coordinator at least once a month and makes the coordinator aware of particular needs. They are en-

couraged to go to conferences, select new materials and transmit new ideas to the staff in the field."

Strengths and Needs of Instructional Staff. According to the coordinator:

> The instructional staff's greatest strengths are their training and their years of experience teaching reading. Ninety percent are state certified reading teachers. Seventy-five percent have a master's degree in reading. A good percentage have been teaching corrective reading for years and have been teaching in this program for 14 years. They are sophisticated in teaching reading and knowledgeable about the populations they are teaching. We have a large number of teachers who really care.
>
> The area in greatest need of strengthening is the teaching of writing skills. The program will continue to provide in-service training necessary for professional growth. No one has yet come up with the magic answer for teaching reading, but we want to keep teachers updated, so they in turn will keep children wanting to come to the reading room.

Recommendations

General. The field supervisor expresesed the need for more supervisory personnel. (The coordinator had also previously indicated that this was a need of the program.)

The coordinator indicated that she would like to see growth in the parent-tutoring and peer-tutoring programs, both of which have had favorable evaluations. In addition, she would like to see more teacher input into staff development through needs assessment, teacher presentations at staff conferences, and more opportunity to bring in top consultants in reading and writing.

Staff Development. Recommendations for staff development included (1) more opportunities for sharing of

techniques that are working in the program, (2) greater opportunities for intervisitations, and (3) enough supervisory staff to follow through with a particular teacher on training which has been initiated.

Materials. With reference to materials, the coordinator is constantly reviewing new products. She would like to field test new materials by buying small quantities for pilot basis use and evaluation before disseminating the materials to the entire staff.

Para-professional Services. Para-professional are hired by the districts. "It would help if we could hire them or if we had some clarification about their training. Are we responsible for the para-professionals and if so, in what manner? If the district is responsible, it would help to have some interchange."

Coordination with Regular Classroom Teacher. One recommendation concerning coordination with the regular classroom teachers is that there be increased articulation between the non-public schools classroom teachers and the Title I staff, particularly regarding pupil needs. Although there is informal contact, some type of structure to increase the communication between the ESL teacher and the regular classroom teacher should be studied within the constraints of the present regulations.

VI. *EVALUATION CONCLUSIONS AND RECOMMENDATIONS*

Conclusions

The Corrective Reading Program offers its teachers a wide variety of techniques and approaches to teaching reading. Teachers are free to select the techniques best suited for their students (and their teaching style) within the framework of a diagnostic prescriptive approach to teaching reading.

During the interviews, 67% of the teachers offered unsolicited praise for the program. Teachers also expressed satisfaction with the instructional materials they received

and with the organization of the program. Overall, the staff appeared enthusiastic about the program. Furthermore, the test data indicates that pupils made significant gains in reading achievement, during the course of the year. It should also be noted that the classroom observations made by the evaluation consultant were in accord with the teachers stated foci of instruction.

Recommendations

An administrative practice worthy of praise is the manner in which instructional materials are selected for use. The materials are piloted on a sample of teachers to obtain their feedback before the material is considered for distribution system wide. We suggest that this practice be adopted in the other Title I Nonpublic School Program components.

The major addition to the Corrective Reading Program this year was the state mandated writing program. Ninety-two percent of the surveyed teachers indicated that they had observed improvement in student writing ability—i.e., ability to write in longer units, growth in sentence sense, and improved self-expression. We recommend that the program continue to implement the successful practices begun this year. Through the collecting of information about the writing program from teachers and the program coordinator, the evaluation team was able to learn about the communication between the staff and program coordinator. It is noteworthy that the coordinator's perceptions of the teachers needs, related to teaching writing, matched the teachers own stated needs. One issue which should be assessed next year is the impact of the writing program on reading achievement.

Finally, the evaluation team recommends that the impact of the reading readiness program should be assessed, along with the program's staff development activities.

DEFENDANTS' SUPPLEMENTAL EXHIBIT C

OEE
EVALUATION
REPORT

FINAL EVALUATION REPORT

ESEA Title I

Project Identification Number: 5001-64-01623

ESEA TITLE I
NONPUBLIC SCHOOL PROGRAMS
READING SKILLS SERVICES
1979-1980

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I. *PROGRAM DESCRIPTION*

The Title I Nonpublic Schools Reading Skills Program, hereafter called, the Reading Skills Program, served 431 nonpublic school students in grades 4-8 at nine sites; the students are Title I eligible, have severe reading problems, and need one-to-one instruction.* The program's goal is to provide individualized diagnostic-prescriptive reading and writing skills instruction for severely disabled readers. Students demonstrate, through mastery on criterion-referenced tests, their reading proficiency in the areas of word study, vocabulary, comprehension and study skills.

Depending on the severity of the reading problem, students meet with the Reading Skills teacher three to five times per week from 45 to 60 minute sessions. This instruction continues until the student is able to function adequately in the regular nonpublic school classroom and has no further need for supplemental instruction.

The staff included one full time (FTE)** coordinator, 17 FTE teachers, and one FTE secretary. Each teacher provides a minimum of four hours of instruction per day. In addition, a one hour conference period was set up each day to be used by teachers to meet with parents, communicate with nonpublic school personnel, and to diagnose individual pupil needs.

The purpose of this evaluation report is to report student achievement data, describe program implementation from the teachers' and coordinators' perspectives, and to

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* Students are ineligible if they are non-English speaking, receive the services of the Title I Corrective Reading Program or the services of the Title I English as a Second Language Program or are enrolled in a District Reading Program.

** FTE: Full-time equivalent; one FTE is equivalent to one full-time staff position. Some teachers in the program are hired on a part-time or per diem basis, therefore, the amount of teach-in service is expressed in FTE's in lieu of reporting the number of teachers employed.

indicate directions for a more in depth evaluation during the 1980-81 year.

II. *DATA ANALYSIS*

Objectives

The objective of this program was that students were to achieve gains in performance in reading comprehension greater than would have been expected in the absence of treatment. Reading comprehension was measured by performance on the comprehension subtest of the Stanford Diagnostic Reading Test, 1976 edition.

USOE Evaluation Model A1 was used to derive the "no-treatment expectation". Pretest raw scores were converted to Normal Curve Equivalents (a type of score which expresses performance in relation to the performance of a nationally representative group of students), NCE's. Posttest scores were also converted to NCE's. It was assumed that, in the absence of treatment, the mean NCE of the group would be the same at posttest as at pretest.

An increase in mean NCE's was interpreted as a gain in performance beyond what would have been expected without treatment.

Grade 4 students were tested on the comprehension subtest of the Standford Diagnostic Reading Test, Form B, Green level. Grades 5-8 were tested on the Brown level of the same test.

Summary and Analysis of Results

Of the 431 students reported as program participants, valid pretest and posttest data were submitted for 422 students. The program results are positive (refer to Chart I). On the average, students in Grades 4 through 8 gained 11 NCE's, with a range from 9 to 12 NCE's. In all four grades, students' average performance at posttest was between NCE 34 and NCE 40. These scores are

approximately equal to a percentile ranking of 22 and 32, respectively. The pretest NCE means range from 23 to 29, or from the 10th to the 16th percentile. Thus, these students have made major gains during their year in the Reading Skills Center.

Correlated t-tests were performed on all raw scores and NCE's for each grade level. All gains were statistically significant beyond the .001 level.

CHART I.

READING COMPREHENSION SCORES FOR STUDENTS IN SKILLS CENTERS, GRADES 4-8

		Raw Scores		NCE's		Mean Gain in NCE's
		Pre	Post	Pre	Post	
Grade 4	Mean	30	43	26	37	11
N = 44	Median	31	46	27	37	
Grade 5	Mean	15	24	24	36	12
N = 89	Median	15	24	27	38	
Grade 6	Mean	17	28	23	34	11
N = 90	Median	17	28	26	36	
Grade 7	Mean	23	35	26	35	9
N = 105	Median	22	36	29	36	
Grade 8	Mean	31	40	29	40	11
N = 94	Median	33	42	30	40	

III. *SUMMARY OF SURVEY DATA AND TEACHER INTERVIEWS*

Introduction

Data for the responses were collected from 16 teachers who completed the survey at a group meeting at the end of the school year. The survey was constructed based on results from the teacher interviews pretested and revised by the Office of Educational Evaluation with assistance from the central Title I Nonpublic School Program administrators.

Data from the interviews were collected in three schools over the period from May 29, 1980 to June 10, 1980. Each site visit included observing the Title I reading skills class and interviewing the teacher. A total of four reading skills teachers were observed and interviewed; two reading teachers were interviewed at one site because there was ample time to complete both interviews. This was not the case at the other sites; at these sites, the teacher whose last name was closest to "Z" was interviewed. The sites for the evaluation were selected randomly from a stratified sample of schools in the Title I Nonpublic School Reading Skills Program.

The interview form was constructed, pretested, and revised by the Office of Educational Evaluation with assistance from the Central Title I Nonpublic School Program administrators. The interviewer was trained in the use of the form before the interviews began. Teachers being interviewed were informed of the purpose of the interview: to feed information back to the program coordinator for administrative and evaluative purposes. The teachers were assured of complete confidentiality, and their responses are all reported anonymously. Each interview took between 45 and 50 minutes. The mean interview time was 48 minutes.

Given the fact that the number of interviewed teachers was small (N=4), data percentages will not be noted and the narrative statements will tend to be brief.

Information About Teacher Respondents

Teaching Experience. The survey data indicated that 13% of the 17 teachers had total teaching experience of one to five years, 44% had six to ten years, 31% had 11 to 15 years, 6% had 16 to 20 years and 6% had more than 20 years of teaching experience.

All four of the interviewed teachers had over five years of teaching experience; two had taught six to ten years, one had taught 11 to 15 years and one had over twenty years of experience.

Teaching Experience In Title I Nonpublic School Program. Experience in the Title I Nonpublic School Program for teachers responding to the survey was 13%, one year, 0%, two years, 19%, three years, 25%, four years, 44%, more than five years. Of the interviewed teachers, two teachers had four years experience in the Title I Nonpublic School Program and two teachers had five years experience in the program.

Educational Background. All survey respondents indicated that they had an MA/S degree. All four interviewed teachers had an MA/S degree; two had 30 credits over the masters degree.

Professional Development and Activities. Over the past three years, 81% of those responding to the survey had earned college credits, 31% attended non-Title I Board of Education workshops, 19% took United Federation of Teachers' courses, 81% participated in Title I workshops, 69% attended local and national professional conferences, 63% participated in publisher's materials workshops and 25% took other non-credit courses.

During the three years, one interviewed teacher had taken coures for college credits, two are International Reading Association members and all four teachers have attended workshops and/or in-service programs.

Pupil Profile

Number of Students Taught. The average number of pupils taught by the survey respondents was approximately 27. Each of the four teachers interviewed had a total of 25 students at all sites.

Criteria for Selection. All teachers indicated that children who were severely disabled readers were eligible for the program and three teachers identified low achievers in reading as also being eligible. Also mentioned as criteria of selection for the children in reading skills classes were Science Research Associates test scores (SRA) and Metropolitan Achievement test scores (MAT). All interviewed teachers indicated that a student must meet the nonpublic school Title I guidelines.

Participants in Selection. All of the surveyed teachers reported that the Title I teacher participated in the selection of the children for the program. Other responses were nonpublic school principal, 81%; nonpublic school classroom teacher, 63%; Title I guidance counselor, 50%; and other Title I teachers, 69%.

The interviewed teachers reported that people participating in the student selection were Title I teachers (4),* the nonpublic school principal (3), classroom teachers (2), Title I corrective reading teacher (2) and the Title I guidance counselor (1).

Most Common Learning Problems. On the survey, teachers were given a list of eight learning problems and asked to identify the three most common to the students they taught. Percentages of teacher responses were as follows: 13%, problems from other achievement areas; 31%, attention problems; 50%, language problems; 6%, behavioral problems; 44%, poor listening skills; 31%, poor self-image (including fear of failure); 63%, retention skills; and 56%, general problems in concept formation.

Interviewed teachers mentioned a wide variety of learning problems. Most frequently reported were poor comprehension, short attention span, limited language development, and limited language experience (children from Spanish-speaking families). (See Table 1, page 9, for a listing of the teachers' responses.)

Teaching Methodology

Major Areas of Focus. Teachers were asked to indicate on the survey the major areas of focus of their instruction: 94%, diagnostic-prescriptive reading; 94%, diagnostic-prescriptive writing; 94%, comprehension; 81%, work attack skills; 81%, decoding; 75%, sentence structure; 69%, word power; 63%, work-study skills; and 56%, paragraph structure.

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* Numbers in parenthesis indicate the number of respondents selecting or giving a particular response.

All interviewed teachers indicated the following areas of focus for instruction: word attack skills, decoding, word power, comprehension, work and study skills, sentence structure, diagnostic-prescriptive reading and diagnostic-prescriptive writing. Also, three of the four teachers indicated that paragraph structure was an area of focus. Other areas of focus identified were: reading in content areas, punctuation, and vocabulary.

TABLE I

LEARNING PROBLEMS AS REPORTED BY TEACHER INTERVIEWEES (N = 4)

Problems	Number of Responses
Poor comprehension	2
Short attention span	2
Limited language development	2
Limited language experience (children from Spanish speaking families)	2
Low self-esteem	1
Poor background in phonics	1
Low confidence in reading ability	1
Limited experiential background	1
Poor concept vocabulary	1
Difficulty in differentiating sounds	1
Poor visual memory	1
Poor word attack skills	1
Poor socio-economic background	1
Emotional problems	1
Physical problems—need glasses	1
Poor sequential output of skills	1

Time Allocation. The amount of time spent on different instructional groupings was consistent across teachers. Three teachers said they spent 75%-85% of their time on individual instruction. All teachers responding indicated that time was spent on diagnosis, but this was an on-going process associated with the individualized in-

struction. Although all three teachers indicated that they did spend time in whole group instruction, this never exceeded 25% of the total teaching time.

Motivation. The survey asked teachers to indicate the methods or techniques they used to motivate students; they responded: 93.8%, graphs for self-tracking; 81.2%, reward systems (stars, stamps, etc.); 81.2%, other pupil self-evaluation techniques; 25%, games; 25%, other manipulatives. Teachers in the survey were asked to indicate the behavioral changes they were aware of as a result of the increased motivation. These were: know what to do without asking 63%; willing to try more difficult materials, 50%; more pupil participation in Title I classroom activities, 50%; better self-image, 38%; greater rapport with teachers 19%; and more attentive, 13%.

Three of the four interviewed teachers identified machines (A-V equipment, cassettes, etc.) as a motivating tool they used. Two of the interviewed teachers also indicated that they use high interest materials (e.g., NFL baseball reading kits) and try to focus in on the child's interests and experiences. Other specific motivational techniques mentioned by one teacher each included: motivating the child through the teacher's own interests, creating anticipation to stimulate the child's interest and encouraging the pupil to follow-up on their own, low pupil-teacher ratio, graphing student progress (self-competition) and "breaking the code" in the High Intensity Learning System (HILS) Program.

Interviewed teachers commented that as a result of increased motivation, they have noted the children are more outgoing (2), more verbally communicative (2), more willing to try difficult materials (2), reading to each other and themselves more frequently (1), learning to follow directions (1), aware of what to do without asking (1), and feeling independent because they have a "job" (1).

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* One teacher would not respond to this question indicating the program was individualized.

Peer Tutoring, Independent Study, and Individualized Instruction. Sixty-three percent of the teachers responding to the survey reported that their students were involved in peer tutoring. Sixty-nine percent reported that their students were involved in independent study activities.

During the interviews, three teachers indicated that their students were involved in peer tutoring. This took the form of older children helping younger children or a child, who had finished early, proof-reading another child's work. All of the teachers interviewed reported that their students participated in self-evaluation and three teachers stated that their students did independent study.

*Writing Skills, Survey Results.** All of the teachers responded that they use the writing of a journal in connection with teaching writing. Fifty percent indicated that the journal writing had been extremely effective for the diagnosis of writing skills as compared to using a diagnostic tool. Other responses were very effective, 38%; and somewhat effective, 13%. Teachers were given three areas of growth and asked if they could detect any growth in the students' writing from the review of the pupil journals: 100% indicated growth in ability to express oneself, 100% reported growth in the ability to write in longer units and 94% reported growth in sentence sense.

Writing Skills, Interview Results. Each of three teachers, responding to a question on improvement,** indicated pupil improvement in different areas: "vocabulary, spelling and word usage improvement and a better understanding of the main idea when they were taught paragraph structure"; "when children write their own work, they are able to read it"; and, "children realize that writ-

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* In appendix are Writing Skills Guidelines, Writing Skills Diagnostic Profile Sheets and Writing Skills Scope and Sequence of Program.

** Evaluator omitted this question from one interview.

ing is talking written down and that it is a real method of communication."

All interviewed teachers had a different preference for a weekly time schedule for teaching writing. One teacher had no preference. One teacher indicated that she would like to teach writing everyday for the first ten minutes of the class period. Another preferred to teach it one day a week as a group lesson and the fourth teacher indicated her preference was to teach writing twice a week during the 60-minute classes.

Journal writing was used by all four teachers in connection with teaching writing. Teachers indicated that the journal writing had not only been an effective diagnostic tool but had also been effective in teaching punctuation, sentence expansion and usage.

All teachers indicated that their students had grown in sentence sense, the ability to express themselves effectively and the ability to write in longer units. Two teachers reported that the students have gone from writing sentences to writing stories and compositions.

Pupil Assessment

The following table summarizes the teachers' responses on the survey to pupil assessment methods.

TABLE 2

PERCENT OF TEACHERS USING VARIOUS ASSESSMENTS AT THE BEGINNING OF THE YEAR AND DURING THE YEAR

Method	Used at Beginning	Used During Year
1. Nonpublic School Program Assessment	50%	44%
2. An Informal Reading Test	56%	63%
3. A Standardized Norm Referenced Test	75%	44%
4. Teacher Made Criterion-Referenced Test (CRT)	38%	56%
5. A Commercially Made CRT	100%	100%
6. Conference with Classroom Teacher	63%	69%
7. Classroom Observation	0%	63%

Teachers were asked to check on the survey the two major purposes for which they used the results of the initial pupil assessment: 100%, to individualize instruction; 63%, for diagnosis; 13%, to evaluate progress; 13%, for lesson plans; and 13%, to teach pupils self-evaluation.

All teachers used the Stanford Diagnostic Test for assessment at the beginning of the year. Two teachers also used SRA or MAT scores, two teachers used the Random House High Intensity Learning System and one used informal observation check-in lists for initial assessment.

The initial pupil assessment was used by all teachers to individualize instruction and to fulfill Title I program requirements. Other purposes of the initial assessment reported were: to plan long-range lessons (3), to evaluate progress (2), to organize group work (1), to diagnose (1) and to plan short-term lessons (1).

The Random House High Intensity Learning System check-in and check-out tests were administered by all teachers to reassess the students' progress during the year. The frequency of this testing ranged from every two to three days to once a month depending on the skill and on the individual child. Three of the four teachers also indicated that they reassess students through daily observations. One teacher conducts (approximately ten times a year) book conferences with children to discuss the books each child has read.

Pupil re-assessments were used by all interviewed teachers to evaluate progress and to individualize instruction (3), to help the child to become a stronger balanced reader (2), to organize group work (1), to plan long-range lessons (1), and to plan short-range lessons (1).

Students Records. For each child, all four interviewed teachers kept records of: the student's diagnostic assessment of reading and writing needs; specific instructional objectives in word study, vocabulary, comprehension and study skills; prescribed reading and writing objectives; student mastery of objectives; daily attendance; and

standardized and criterion-referenced tests. Additional records kept by teachers included lesson plans (in a plan book); a daily log noting conferences and pupil work/problems; and folders on students' progress from past years.

Related Duties. Interviewed teachers were asked to specify their duties related to teaching. All teachers reported that they selected pupils, administered tests, defined short- and long-range objectives, individualized lesson plans, evaluated pupil progress, scheduled pupils for instruction, met with parents, made clinical/guidance referrals and discussed pupil status with other Title I staff. Two teachers indicated that they directed the activities of the para-professional.

Materials Used. All of the interviewed teachers indicated that the materials they have in their classrooms are appropriate for the pupils they teach. In addition, all responded that the materials in their classrooms are helpful to them in the manner in which they teach. Selection of materials was identified by all four teachers as being provided by the Title I central staff; two teachers indicated that the Title I teacher helped to select materials.

Support Services

Clinical and Guidance. The results of the survey item asking teachers to specify all those who refer pupils to clinical and guidance services were: 100%, Title I teachers; 69%, nonpublic school principal; 88%, other Title I teachers; 94%, nonpublic school classroom teacher and 13%, parents. These Title I clinical and guidance services were rated extremely effective by 25% of the teachers surveyed, 25% rated the services very effective, and 50% rated the services as somewhat effective.

The interviewed teachers indicated that the Title I teachers refer students to the clinical and guidance services. The regular classroom teacher also can refer student (1). All of the interviewed teachers found these services to be effective.

Nonpublic School Principal. Teachers answering the survey indicated they receive support from the public school principal through orientations to school procedures, 81%; scheduling, 69%; arranging conferences with the regular nonpublic school classroom teachers, 44% and monthly conferences, 19%.

All of the interviewed teachers indicated that the principal of their school encourages coordination with regular classroom teachers, provides orientation to school procedures, and makes scheduling decisions. Three interviewed teachers noted that they received support from their principals in the following ways: the principal's attendance at the monthly conferences, the principal's respects for the program, and the principal's assistance in gaining the cooperation of parents, students, and teachers.

Title I Central Staff. On the survey, 94% of the teachers stated that the Title I central staff provided training/orientation; 88%, supervisory visits; 81%, demonstration of instructional methods; 81%, resource materials; 69%, teacher evaluation of suggested techniques; 63%, follow-up conference notes; 44%, assistance in testing/diagnosis; and 38% assistance in pupil selection.

All four interviewed teachers identified the following as support services they had received from the Title I central staff: training and orientation, demonstration of instructional methods, resource materials, follow-up conference notes, evaluation of suggested teaching techniques, and supervisory visits. Other support services provided were: assistance in testing and diagnosis (2), assistance in pupil selection (1), guidance services and psychologists (1), and accessibility for phone contact (1).

Parent Contact

Number and Frequency. The survey reveals that the teachers meet an average of 40.4% of the parents. Thirty percent of the teachers reported seeing parents on

a continuous basis, either weekly or monthly; 65.1% saw parents every reporting period; and 88.9% indicated they met with parents on a yearly basis.

Results of the interviews revealed that the number of parents met at each site ranged from six to 14. The mean number of parents met was 11.* Two teachers see some parents daily, one teacher sees some parents weekly and all teachers see some parents every reporting period.

Method. Contacts with parents reported by teachers responding to the survey were face-to-face (80.5%), by telephone (29.7%), by written communication (100%) and in parent/tutorial workshops (80.3%).

Most of the communication between parents and interviewed teachers was face-to-face. Two teachers used the phone as a means of communication and all used written communication (which include the Progress Reports which are issued twice a year).

Initiation. On the survey, 100% of the teachers indicated that they initiated the majority of teacher-parent contacts.

One of the interviewed teachers indicated that initial contact is made by the Title I teacher and the other three indicated that the parents had made their initial contact.

Classroom and Home Involvement. Parental involvement in the classroom is reported by interviewed teachers to be primarily through individual conferences to discuss their child's progress. Two teachers indicated that parents came to observe; two indicated workshops had been held for parents, and one teacher indicated that parents were involved in tutoring.

Interviewed teachers indicated that at home the parents discussed books with their children; parents have asked teachers for books to take home and read with

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* More parent contact is being provided for the students than this figure indicates; in some instances the para-professionals meet parents with the teacher present.

their children; and parents watched the television news with their children.

Major Concern of Parents. All teachers responding to the survey reported that the parents' major concern was that their children approach grade level academic performance.

Interviewed teachers report the major concerns of the parents to be: reading score improvement (2), children watch too much television (1), acceptance of the child to a good high school (1), and ways in which parents can help at home (1).

Recommendations

Survey Results. On the survey, teachers were given seven recommendations and asked to indicate which was most important for the improvement of the Title I program. The responses were:

44%—No significant improvement is required.

19%—More Title I teacher involvement in materials selection.

19%—More opportunity for coordination with the nonpublic classroom teachers.

13%—More workshops based Title I teacher input (re: teaching techniques).

6%—Fewer students seen more often.

General. Overall, morale of the Reading Skills teachers was very high. The reading teachers felt that the program was well suited for the children they taught.

Two teachers had concern about the child's removal from the regular classroom while he/she is in the Title I class; the child misses work being done in the regular classroom. One teacher felt more interaction between the Title I teacher and the regular teacher would alleviate some of the problems this presents. The other teacher recommended that the child be removed from only

one content area allowing the Title I teacher to reinforce the subject manner the child was missing.

Another teacher indicated that she would like machines—specifically additional tape recorders and a rexograph machine.

Other recommendations were:

Materials. One teacher recommended more library books because a certain percentage are lost each year.

Coordination with Regular Classroom Teacher. The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupil achievement and progress reports are reviewed with nonpublic school staff. However, one teacher indicated more communication was needed. It should be noted that Constitutional limitations and judicial decisions determine the extent to which Title I staff are involved in the nonpublic school instructional program.

IV. *CLASSROOM OBSERVATION SUMMARY*

Introduction

Three sites of the nine sites were visited. Classroom observations varied in time from 30 minutes to 60 minutes. All three observations took place in the morning; the earliest started at 9:45 A.M. and all observations were completed by 12:30 P.M.

Classroom Characteristics

All three classrooms were adequate with regards to lighting, orderliness, space, ventilation, freedom from external noise, and flexibility.

General Observations

Individualized instruction was observed in all classrooms. Also, children were assigned individual, small

group or whole group tasks. The teacher would then circulate and help students. The High Intensity Learning System Program was observed being used in all classrooms. Small group work was observed in two of the classrooms.

Observation Checklist: Teacher

All of the teachers were observed working along with the children; helping children to solve academic problems; encouraging and reinforcing children in their work; giving feedback to children on their progress; and providing individual pupil conferences. Teachers were also observed talking with children about their activities for the instruction period, having general discussions with the pupils, encouraging the children to work independently, and encouraging the children to work together.

TABLE 3

CLASSROOM OBSERVATION CHECKLIST: TEACHER
(Number of Classrooms = 3)

Activities	Number of Teachers Observed
Encourages children to work independently	1
Encourages children to work together	1
Talks with children about their activities for the instruction period	2
Works along with children	3
Encourages/reinforces children in their work	3
Gives feedback to children on their progress	3
Pupil diagnosis/prescription	0
General discussions with pupil(s)	2
Individual pupil conference	3

Observation Checklist: Children

In all classrooms children were observed working independently. Children's work was visibly displayed in all classrooms. There was no overt anti-social behavior observed.

TABLE 4

CLASSROOM OBSERVATION CHECKLIST: CHILDREN
(Number of Classrooms = 3)

Activities	Number of Classrooms Observed
Work independently	3
Work in small groups independent of teacher	0
Overt anti-social behavior	0
Children's work is visibly displayed in classroom	3

V. *SUMMARY OF INTERVIEW WITH PROGRAM COORDINATOR*

Introduction

The Program Coordinator has been involved with Title I programs in reading since 1968—three and a half years as a corrective reading teacher, seven years as corrective reading supervisor and one year as the Reading Skills Program Coordinator. The interview with the program coordinator lasted one hour, 50 minutes.

Program Considerations

Goals. The Program Coordinator specified several educational goals and philosophic orientations: (1) to identify and remediate student techniques include teacher-made and commercial materials; (2) to establish rapport between the teachers and pupils; she stressed that this rapport is essential before learning can take place; (3) to establish a non-threatening environment for the students and create an atmosphere of trust; (4) to create a democratic classroom where children are a part of the teaching-learning process; and, (5) to engage children in the learning process so that the children will understand their own needs, know why they are there, what they are doing, and be part of the evaluation process.

These goals were developed by assessing the needs of the target population through diagnostic and standardized test results, results from previous evaluations, current research in learning methodologies, exploration of newer materials on the commercial market and input from reading skills teachers via their pupil evaluations.

The goals have changed since the beginning of the program largely as a result of changes in State mandates. This year the State-mandated writing program was instituted. New teaching methodologies were employed, along with the purchase of new materials to foster the development of the writing program. Other changes in the program included increased teacher participation in materials selection* and more encouragement of parental cooperation.

Strengths and Needs. The program coordinator indicated several strengths of the program. The first one she mentioned was the individual diagnostic-prescriptive approach coupled with the small teacher-pupil ratio. This approach is possible because of the variety of materials in all skill areas, and the effective classroom management system (criterion-referenced testing, mastery learning and others). The instructional staff was aided by inter-visitations, conferences, demonstration lessons, observations, and staff training bulletins. In addition, the small supervisor-staff ratio encourages flexibility. It was also noted that the supervisor has a car which makes it easier to meet with the program's teachers. The coordinator also indicated that there was cooperation and support from the Title I Director and Assistant Director and open channels of communication with other Board of Education agencies.

To strengthen the program, the Coordinator suggested continued work in developing oral language facility and furthering concept development. In addition, she sug-

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* See Appendix for a copy of the evaluation form used by teachers to assess materials they used in classroom.

gested continued teacher training in the areas of writing skills and awareness of pupil's needs. Changes anticipated or planned include introducing professional literature, follow-up work on sentence combining and sentence expansion and a continued focus on the writing skills program in the form of continued research, use of the teacher-made materials, and purchase of more commercially-made materials.

Purpose of Program Assessment. Program assessments were used to determine the degree to which the specific reading and writing skill objectives were attained by the individual pupils, to further identify the needs of the target population, to develop the curriculum and incorporate necessary changes, to assess materials (and thus influence what materials to purchase), and to evaluate teacher training.

Instructional Considerations

Approaches to Instruction. Within the individualized diagnostic-prescriptive approach, a wide variety of methods to teach reading and writing were utilized. The students are grouped together for instructional purposes—to be paired with tutors or to form small groups based on pupil interests. Teachers used a variety of materials to explain and refine a skill—bulletin boards, demonstrations, reference materials and the like. Other methods used were language experience, direct instruction, phonics, and emphasis on the task analysis of the skills.

Daily Lesson. General components of the daily lesson should include journal writing, sustained reading, one-to-one diagnosis of pupils needs, direct skill instruction, mastery testing, and some type of reinforcement activity to remediate specific weaknesses using commercially prepared materials.

Motivation. The Program Coordinator indicated that motivation must be directly related to the objective and aims to tap the needs, interests, and abilities of the student. Specific techniques included questioning strategies,

using the child's experiential background; the use of pictures, diagrams and physical representations; discussions, demonstrations and explanations; audio-visual materials (machines, cassettes and other); and reading stories aloud.

Overlap Between What is Taught and What is Tested. The program coordinator stated that there is an overlap between what is taught and what is tested. The program has specific objectives outlined in the materials and the mastery tests are directly related to the attainment of these objectives. Further, the analysis of the journal writing is directly related to the instructional program. This overlap is indicated by the high correlation between the needs of the students (indicated by the standardized tests) and the skills the coordinator observed being taught in the classrooms.

Introduction of New Ideas/Approaches/Topics. Because this was the program coordinator's first year, she was only able to speak of the changes implemented this year. The writing program was initiated this year using the individualized prescriptive approach focusing on the skills and techniques of sentence combining, sentence expansion and diagnostic profiles on writing skills. Teachers were encouraged to implement an oral and listening vocabulary development program using the pupil's experiential background and to develop oral communication skills (as a prerequisite to writing skills).

These ideas/approaches/topics were introduced to the teachers in staff training sessions using the following techniques: demonstration lessons; workshops; staff bulletins (as follow-ups to the demonstration lessons and workshops); presentation of current research to the teachers at conferences; and disseminating information about local reading councils, fairs, and exhibits. In addition, teachers were observed (informally and formally) to see if various ideas/approaches/topics had been used in the classroom. If the coordinator observed the teacher using skills, materials or ideas in the classroom that had

been previously demonstrated, a note of praise was sent to the teacher after the field visit stating the specific skill that had been implemented.

Student Considerations

Reporting a Student's Progress. The student gets feedback on his progress in a number of ways. The High Intensity Learning System program includes check-in/check-out tests which are used regularly (daily to weekly depending on the need). Wall charts are used daily. Pupil-teacher conferences also provide the student with an evaluation of his/her progress. Students also see their progress reports which are issued twice a year.

Written progress reports are issued to the parents twice a year. The teachers are also available for individual and group conferences. The frequency of these conferences varies with the need of the child and the availability of the parents.

The principals are given special reporting forms which indicate the results of the posttesting. There is also ongoing communication between the teachers and the school principals as needed. Nonpublic school classroom teachers are also provided with Pupil Profile Reports indicating strengths and weaknesses in skill areas.

Retention of Students. The guidelines for selecting a student are built into the program. A child can stay until he/she reaches grade level at which time they leave the program. There is no limit to the number of years a student can remain in the program.

Personnel Considerations

Coordinator's Responsibilities. Formal observations are employed to evaluate teachers. The teachers are assessed by observing to what degree they have implemented the guidelines and approaches/ideas/topics introduced to them in workshops, conferences, staff bulletins and the like. Teachers are formally evaluated once a

year. There are also unannounced site visits. If a teacher's performance is observed to be unsatisfactory, the program coordinator would plan teacher training sessions, discuss the situation with the Program Director and follow the established Board of Education procedures, if necessary.

The program coordinator reported that she meets the responsibility of relating to other Title I coordinators through on-going communication with the coordinators of other Title I services. There is informal communication regarding materials, methodologies, staff training programs, specific pupil needs, scheduling and the like. Title I Clinical and Guidance Program sends to the coordinators pertinent data monthly.

Program change and the development of staff are the result of: attending conventions, conferences, and training sessions; following current research; reviewing new materials; developing staff training programs; and communicating with other Board of Education divisions.

Strengths and Needs of Instructional Staff. The Program Coordinator indicated that the greatest strengths of the instructional staff were their diagnostic techniques, evaluation techniques (check-in and check-out mastery testing), methods of reporting data (pupil record keeping), and communicating with the other supportive Title I services staff and the classroom teacher in the nonpublic school.

Recommendations

The Program Coordinator's recommendations were related to staff development activities:

—The instructional staff should be strengthened in the use of tools for evaluation in the writing skills component.

—Teachers should assist pupils in developing language facility, especially oral and listening vocabulary.

—Teachers should be given additional instruction in the primary scoring, interpretation, and use of the California Achievement Test data. (The program will be using the CAT for the first time next year in place of the Stanford Diagnostic Reading Test.)

VI. *EVALUATION CONCLUSIONS AND RECOMMENDATIONS*

Conclusions

Students in the Reading Skills Center showed significant improvement in reading achievement as measured by the Stanford Diagnostic Reading Test. On the average, students who took both the pretest and posttest gained 11 NCE's. Given that the State Education Department has set the gain of 1 NCE as the minimum criterion for programs to demonstrate significant educational impact, it can be concluded that pupils in this program have made substantial improvement in reading ability during the course of this year.

Observations and interviews revealed the following information related to program implementation. In all classrooms, children were observed working independently and student work was visibily displayed. Teachers expressed satisfaction with the instructional materials they had received and the staff training provided by the program coordinator. Overall, morale was high; both teachers and the program coordinator were pleased to be working in the program. These statements are supported by the fact that 44% of the surveyed teachers felt that the program needed no significant improvement.

Furthermore, communication between the teachers and the program coordinator was excellent. The coordinator's perceptions of the instructional needs of students were in accordance with teacher preceptions. Specifically, 50% of the teachers identified language problems as one of the three most common learning problems of students

they taught; 44% identified poor listening skills as a major learning problem. The coordinator showed awareness of student problems in these areas in her recommendation that teacher training sessions be devoted to developing oral language facility.

Recommendations

Since the writing component and the development of oral vocabulary and listening skills were new features to the program this year, the evaluation team supports the coordinator's recommendations that: (1) staff development in these areas be continued, and (2) the implementation of these components be monitored.

Since the journal writing technique was identified by teachers as an effective tool in the teaching of writing, especially punctuation, sentence use, and sentence expansion, it is recommended that this technique be continued. Methods should be developed to evaluate the pupils' journal writing; and the impact of the writing program on reading achievement should be assessed.

DEFENDANTS' SUPPLEMENTAL EXHIBIT D

OEE
EVALUATION
REPORT

FINAL EVALUATION REPORT

ESEA Title I

Project Identification Number: 5001-64-01625

ESEA TITLE I

NONPUBLIC SCHOOL PROGRAMS
ENGLISH AS A SECOND LANGUAGE

1979-1980

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I. *PROGRAM DESCRIPTION*

The Title I Nonpublic Schools English as a Second Language Program, also referred to as the ESL Program, served 3,360 nonpublic school students in grades K-8 at 86 sites. All the students, were Title I eligible and exhibited deficiencies in the use of English language skills in the areas of listening, speaking, reading, and writing. Student language development was measured by an analysis of their scores on standardized pre- and post-tests. The major component of the program was small group instruction (maximum of ten pupils) with a licensed ESL teacher. These groups met two to five times per week for a maximum of 60 minutes per session, depending on the severity of the language deficit.

The project funded salaries for teachers, supervisors, and administrative staff. The staff included one coordinator, one field supervisor, 51.4 full-time equivalent (FTE)* teachers, and two FTE secretaries. The funds for teaching materials (language games, textbooks, workbooks, pictures, and posters) and audio-visual resources (tape-recorders, film-strips, language master machines, records, and tapes) were also provided by the program.

II. *DATA ANALYSIS*

Objectives And Tests Used

Students were to improve in auditory skills as measured by their performance on the language subtest of the 1978 Test of Basic Experience (TOBE), level K for kindergarten and level L for grade 1; and their performance on the Total Auditory subtest of the 1973 Stanford Achievement Test (SAT), Primary I, Form A, for grades 2-8.

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* FTE: Full-time equivalent; one FTE is equivalent to one full-time staff position. Some teachers in the program are hired on a part-time or per diem basis; therefore, the amount of teaching service is expressed in FTE's in lieu of reporting the number of teachers employed.

Report And Analysis Of Evaluation Results

Standardized tests: The program served 3,360 pupils according to records. Data were submitted for approximately 3,333 pupils. Valid pre- and posttest data on the TOBE or the SAT Auditory were obtained for 3,077 students. In addition 48 students were pre- and posttested on the SAT Reading Test Primary I, Form A Total Reading.

All raw score means increased from pretest to posttest. Correlated t-tests were performed on the raw scores for each instruments, all gains were statistically significant at the .01 level or better. (See Chart I.)

The program achieved its stated objectives.

CHART I
STANDARDIZED TEST SCORES FOR STUDENTS
IN THE ESL PROGRAM, GRADES K-8

Grade Levels		Raw Score Means Pre-test	Post-test	Gains
Kindergarten TOBE Level L	N=412	7	15	8
Grade 1 TOBE Level L	N=940	10	17	7
Grade 2 SAT Auditory	N=716	26	37	11
Grade 3 SAT Auditory	N=366	34	44	10
Grade 4 SAT Auditory	N=206	32	42	10
Grade 5 SAT Auditory	N=145	33	44	11
Grade 6 SAT Auditory	N=107	33	45	12
Grade 7 SAT Auditory	N= 97	32	45	13
Grade 8 SAT Auditory	N= 88	26	44	18
All Grades	N=3077			

III. *SUMMARY OF SURVEY DATA AND TEACHER INTERVIEWS*

Introduction

Data were collected from 42 teachers who completed a questionnaire at a group meeting at the end of the school year. The questionnaire forms were constructed, pretested, and revised by the Office of Educational Evaluation with the assistance of Title I central nonpublic school administrators.

Data for the interview summaries were collected in eight schools. Each site visit included an observation of the Title I class and an interview with the teacher. The sites for this evaluation were selected randomly from a stratified sample of schools in the Title I English as a Second Language Program. The interview form was also constructed, pretested, and revised by the Office of Educational Evaluation with the assistance of the Title I central nonpublic school administrators. The interviewer was trained in the use of the form before the interviews began. The interviewed teachers were informed of the purpose of the interview: to feed back information to the program coordinators for administrative and evaluative purposes. The teachers were assured their responses would be reported anonymously.

Information About Teacher Respondents

Teaching Experience. Teachers were asked to indicate how many years of teaching experience they had. Responses to the teacher survey indicated that 26% of the teachers had one to five years total teaching experience; 43% had six to ten years experience; 21% had 11 to 15 years experience; 2% had 16 to 20 years experience and 7% had more than 20 years teaching experience.

All interviewed teachers had a minimum of five years teaching experience. Sixty-three percent of the teachers

had six to ten years experience, 13% had 11 to 15 years experience, 13% had 16 to 20 years experience, and 13% had more than 20 years experience.

Teaching Experience in the Title I ESL Program. Twelve percent of the survey respondents had been in the program one year, 15% had two years experience, 14% had three years experience, 14% had four years experience, and 52% had more than five years experience in the program.

Thirteen percent of the interviewed teachers had taught in the program for five years, 63% had been in the program for six to ten years, and 25% had 11 to 15 years.

Educational Background. The survey revealed that 12% of the teachers had only a BA/S degree, 10% had a BA/S degree and graduate credits, and 79% had a MA/S degree.

All of the interviewed teachers had a BA/S degree. Seventy-five percent had an MA/S degree, but the 25% teachers who did not have an MA/S degree did have at least 30 graduate credits in ESL. In addition, 50% of the teachers with an MA/S degree had also taken 12 or more graduate credits beyond the MA/S degree.

Professional Development and Activities. During the past three years, 86% of the survey respondents earned college credits, 12% attended Non-Title I Board of Education workshops, 26% attended UFT courses, 74% participated in Title I workshops, 43% attended local and national professional courses, 48% participated in publisher's materials workshops, and 45% took other non-credit courses.

During the past three years, all interviewed teachers were involved in some type of professional development: 75% of the teachers interviewed had taken courses for college credit; 50% indicated they were involved in some type of self-initiated professional activity; and 63% reported they had attended conferences or professional meetings, particularly the Teachers of English to Speak-

ers of Other Language (TESOL) and the regional New York State English to Speakers of Other Language Bilingual Education Association meetings. One teacher taught ESL to Chinese adults and Vietnamese "boat people" and another teacher had traveled to a Spanish-speaking country. All teachers had attended staff training program meetings.

Pupil Profile

Number of Students Taught. The survey data indicated that each teacher was assigned approximately 59 students.

Information gathered from the service interviews showed the number of students taught by any one teacher ranged from 52 to 65*. Seventy-five percent of the teachers taught at two sites and 25% of the teachers taught at only one site.

Criteria for Selection. In interviews, most Title I teachers (88%) responded that "limited English speaking" ability was a criterion for student selection into the program. The recommendations of the NPS classroom teacher (75%) and the Title I teacher (50%) were also identified as selection criteria.

Other criteria of selection reported by the eight interviewed teachers were: principal recommendations, low achievers in reading, low achievers in math, Spanish/English spoken in the home, severely disabled readers, and test results.

Participants in Selection. All interviewed teachers identified the Title I teacher as a participant in the selection of children for the program. Eighty-eight percent of the teachers recognized the classroom teacher and/or Title I guidelines as a determinant in the selection.

Of the 42 respondents to the survey, 98% indicated that the Title I teacher participated in the selection of

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* These results are based on the responses of seven of the eight teachers teachers [sic] interviewed.

the children in the program, 9% named the nonpublic school principal, 100% selected the classroom teacher, 17% named the guidance counselor and 43% named other Title I teachers.

Most Common Learning Problems. The survey listed eight learning problems and asked teachers to identify the three most common. The teachers' responses were as follows: problems from other achievement areas, 10%; attention problems, 19%; language problems, 81%; behavioral problems, 12%; poor listening skills, 34%; poor self-image, including fear of failure, 35%; retention skills, 33%; and general problems in concept formation, 29%.

The most commonly identified learning problems reported by the eight interviewed teachers were the four language skills; listening (86%), speaking (57%), reading (29%), and writing (29%). These were the only areas identified by more than one teacher. Additional problems mentioned were motor development, perceptual development, conceptual development, auditory discrimination, cognitive skills, motivation, following directions, transition from Spanish to English, vocabulary and language structure.

Teaching Methodology

Major Areas of Focus. The survey requested teachers to specify the major areas of focus for their instruction. The responses were: develop speaking skills, 100%; develop listening skills, 98%; conceptual development, 91%; develop cognitive skills, 83%; experiential development, 86%; develop writing skills, 64%; and develop reading skills, 64%.

All teachers interviewed named the four basic linguistic skills—listening, speaking, reading, and writing, as major areas of focus of instruction; 25% of the teachers indicated cognitive development as an area of focus. Other areas of focus named by 13% of the teachers included creativity and experiential development.

Motivation. When asked "What methods or techniques do you use to motivate your students?", surveyed teachers responded: games, 90.5%; graphs for self-tracking, 11.9%; reward system (stars, stamps, etc.), 83.3%; use of manipulatives, 69.0%; and other pupil self-evaluative techniques, 31.0%. This question was followed by "If you have noticed behavioral changes that indicate increased motivation, check the *two most obvious ones.*" The responses were: 26%, willingness to try more difficult materials; 71%, more pupil participation in Title I classroom activities; 17%, know what to do without asking; 29%, more attentive; 17%, greater rapport with teacher; and 38%, better self-image.

When the eight interviewed teachers were asked what methods or techniques were used to motivate students, many teachers responded "anything that will work." Specific motivation techniques included audio-visual aids (50%), games (50%), songs (38%), dramatizations (25%), language masters (25%), pictures (13%), and purposeful errors (13%).

The behavioral changes noticed by teachers that indicated increased motivation were increased participation (50%), "happy faces" (50%), and increased confidence (25%). Teachers also noted that students paid more attention (13%) and they seemed more mature (13%).

Peer Tutoring, Independent Study, and Individualized Instruction.

Teachers were asked if students were involved in peer tutoring, self-evaluations, or independent study. On the survey, the responses were: peer-tutoring, 52%; independent activities, 57%; and self-evaluation, 0%.

During the interviews most of the teachers (88%) indicated that their students participated in peer tutoring. This was usually informal, one student helping another. Seventy-five percent of the teachers reported that students evaluated themselves in some activities and 38% of the teachers indicated their students were involved in independent study (reading books independ-

ently, playing games independently, and/or doing rexographs independently).

Pupil Assessment. Table 1 summarizes the teachers' responses on the survey to pupil assessment methods. Surveyed teachers were asked to indicate the two major purposes of the initial pupil assessment: 38%, to individualize instruction; 40%, to organize group work; 21, [sic] to evaluate progress; 48%, lesson planning; 2%, record keeping; 40%, diagnosis; and 12%, teacher self-evaluation.

Eighty-eight percent of the eight interviewed teachers indicated that the Title I program assessment (Test of Basic Experience or the Stanford Achievement Test) was used to evaluate the pupil's ability. In addition, all interviewed teachers reported that students were also formally assessed by means of the Oral Teacher Interview and 63% of the teachers assessed their students informally during the first weeks of school through observation, picture discussions, games worksheets, etc.

TABLE 1

Percent of Title I ESL Teachers Using Various Assessments At the Beginning of the Year and During the Year

Assessments	Method used at beginning of the year	Method used during year
Title I program assessment	55%	55%
An informal reading test	2%	10%
A standardized norm referenced test	79%	67%
A standardized criterion referenced test	10%	12%
A teacher made criterion referenced test	52%	50%
Conference with classroom teacher	76%	81%
Classroom observation	0%	74%

All of the eight interviewed teachers used the results of the initial assessment to individualize instruction, to organize group work, and to plan long range lessons.

Fulfilling Title I guidelines and diagnosis were other purposes the teachers reported for the initial assessment.

During the interviews it was found that all teachers evaluated the students during the year through observations. Teachers observed classroom performance as well as out-of-class language performance. Thirty-eight percent of the teachers indicated they administered teacher-made or unit tests, 100% used the Spring administration of the SAT or TOBE test for reassessment, 25% distributed and evaluated rexograph sheets and 25% of the teachers based their reassessment on the evaluation grid.

Pupil reassessments were used by all interviewed teachers to individualize instruction, organize group work, and to fulfill the Title I guidelines.

Student Records. All interviewed teachers kept records of attendance, pre- and posttest standardized scores, individual profile charts, and pupil's work folders.

Most of the teachers kept records of parent conferences (88%), conferences with nonpublic school staff (88%), and referrals to supportive services.

Interviewed teachers were asked to identify their duties related to teaching. All teachers named the following duties as related to teaching: administer standardized tests, implement the instructional program, conduct needs assessments, organize instructional groups, write lesson plans, adapt or create materials, maintain pupil records, communicate with parents, and confer with classroom teachers.

Materials Used. All interviewed teachers were satisfied with the appropriateness of the materials and many in fact, gave high praise to the choice of materials. All teachers indicated that the Title I central staff and the Title I teacher chose the materials to be used. Some teachers volunteered that it was ultimately a joint effort between the central staff people and the teachers in the program; this issue was discussed at the general staff meetings.

Paraprofessionals. Of the six interviewed teachers who did not have paraprofessional assistance, two said they would like to have this assistance. It should be noted that paraprofessionals are employees of decentralized programs and as such, are hired, supervised and evaluated by community school district staff.

Paraprofessional staff when assigned by community school districts will, under the guidance of the Title I teacher: (1) work with the selected pupils on a one-to-one or small group basis on specifically planned activities geared to foster skills as diagnosed and taught by the Title I teacher; (2) assist with preparation of materials; and (3) assist with clerical and housekeeping tasks.

Pupil Selection. The pupil selection process was viewed as adequate by all teachers interviewed.

Support Services. The results of the survey asking teachers to specify all those who refer pupils to Clinical and Guidance Systems were: 98%, ESL Title I teacher; 81%, other Title I teachers; 98%, classroom teachers; 81%, principals; and 21%, parents. When asked to rate the Clinical and Guidance Services the survey respondents indicated:

Extremely effective	19%
Very effective	37%
Somewhat effective	35%
Don't Know	9%

It was reported by the interviewed teachers that pupils are referred to Clinical and Guidance Services by the classroom teacher (75%) or the Title I teacher (63%). Often the ESL teacher would talk to the regular classroom teacher informally and then decide to jointly request clinical and guidance services. One teacher (13%) said she never involved herself in referrals. All but one of the interviewed teachers (87%) felt the Clinical and Guidance Services Program was effective. One teacher

did not know the effectiveness of the services because she had never referred students to these services.

When asked what kind of support they received from the nonpublic school principal, the eight interviewed teachers generally spoke of the principal's cooperation. All of the interviewed teachers indicated that the principal provided orientation to school procedures. Eighty-eight percent of these teachers reported that the school principals encouraged coordination with the regular classroom teachers, initiated or were available for dialogue with the Title I teacher, and took care of scheduling matters.

On the survey, 86% of the teachers stated that the Title I central staff provided administrative visits, 89% reported supervisory guidance, 95% specified staff training meetings, and 98% named instructional materials.

The Title I central staff was reported by the interviewed teachers to provide: administrative visits (88%), supervisory guidance (88%), staff training (88%), and instructional materials (65%).

Parent Contact

Number and Frequency. The results of the survey indicate that the teachers meet an average of 35% of the parents. Thirty percent of the teachers reported seeing parents on a continuous basis, either weekly or monthly: 14.8% of the teachers saw some parents weekly; 16.2% reported monthly contact; 67.2% saw parents every reporting period; and 80.8% saw parents on a yearly basis.

The eight interviewed teachers met with 5% to 95% of the parents (four of the teachers met with 40%-50% of the parents). Seventy-five percent of the teachers reported that this contact was yearly, one teacher indicated weekly contact with some parents.

Method. Teachers, responding to the survey, indicated contact with the parents was face-to-face (78.3%

of the teachers reporting); by telephone (12.8%), by written communications (35.2%), and by parent-tutorial workshops (28.0%).

Interviewed teachers reported that they communicated with parents in a variety of ways: face-to-face (63%); telephone (38%); written communication/written progress reports (100%); parent-tutorial (13%); and through the classroom teacher (13%).

Initiation. Eighty-three percent of the Title I teachers indicated on the survey that they initiated the majority of teacher-parent contacts. In addition, 5% named the nonpublic school classroom teachers; 7% indicated the parents; and 2% reported the pupils initiated the majority of parent-teacher contacts.

All of the eight interviewed teachers indicated that contacts were initiated by the Title I teacher. One teacher identified parents as making initial contacts, and one teacher identified the regular classroom teacher.

Interviewed teachers indicated that parents are typically involved in "individual conferences to discuss the child's progress." Seventy-five percent of the interviewed teachers indicated that parents visit the classroom to observe.

During the interviews the teachers were asked if parents were involved with their children in activities at home related to their classroom teaching. The teachers responded that they were sure some parents were involved because notes to parents with suggestions for reinforcing communicative activities were given to the children to take home at least one time each year. The teachers, however, could not give a clear indication as to the degree to which these activities were actually carried out.

Major Concerns of Parents. Most teachers indicated on the survey that parents were concerned that their children were approaching grade level academic performance (81%). Other concerns were promotion (0.5%, and obtaining special services (2%).

Interviewed teachers reported that parents are concerned that their children will master the English language (63%), can read (38%), will be able to function in regular classes (25%), will not lose the first language (25%), and will behave appropriately in the classrooms (13%).

Recommendations

Survey results. On the survey, teachers were given six recommendations and asked to indicate which was most important for the improvement of the Title I English as a Second Language Program. The responses were:

(1) More Title I teacher involvement in materials selection—38%*

(2) More opportunity for coordination with the classroom teacher—26%

(3) More workshops based on Title I teacher input (re: teaching techniques)—17%

(4) Fewer students more often—12%

(5) No significant improvement is needed—7%

(6) More opportunity for coordination with other Title I personnel—2%

General. Most teachers interviewed responded that they were satisfied with the services given to children in the Title I Nonpublic School Program. Three teachers answered that the students needed more contact hours during the week.

Staff Development. Most teachers said that the staff development program was very good. Two (25%) said

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* It should be noted that teachers may not always be aware of the restrictions placed on the selection of materials by the Board of Education vendor guidelines and the federal restrictions on the content of materials in funded programs.

that although the staff development was good, they would like to have even more of it.

Coordination with Nonpublic School Classroom Teachers. The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupil achievement and progress reports are reviewed with nonpublic school staff. It should be noted that Constitutional limitations and judicial decisions determine the extent to which Title I staff are involved in the nonpublic school instructional program.

Coordination with Regular Classroom Teachers. The coordination with the regular classroom teacher, although informal, was ongoing and flexible. One teacher suggested regular classroom teacher could observe some ESL classes.

IV. *CLASSROOM OBSERVATION SUMMARY*

Classroom Characteristics

Lighting was usually adequate. In one particularly dark room, however, the lights should have been turned on. Orderliness was apparent in all rooms. There were clearly delineated areas for different kinds of activities. The same somewhat dark classroom mentioned above was also rather small in space. It seems to be a converted hall/staircase. It was, however, being used as resourcefully and optimally as possible. Ventilation was generally good, with the exception of two classes which needed a little more air.

General Observations. Generally there was a greeting routine in which the days of the week, months of the year, and the numbers—both cardinal and ordinal—were practiced. The objective of most lessons was readily perceived. The materials were adequate for the lessons. The activities coincided with the lessons' objectives. Some teachers said their ESL methodology was either audiolingual or eclectic. They used Carolyn Graham's jazz chants

effectively to develop pattern drills. The students appeared to enjoy these activities.

Observation Checklist: Teacher

The ESL classes were conducted according to a small group instructional model. Students were observed to be attentive to the teachers as they gave pre-activity directions or orientation comments. The teachers modeled appropriate linguistic behavior and provided encouragement and reinforcement through a variety of oral and written comments. The teachers worked along with the children while singing jazz chants, frequently taking a pupil's role while a pupil was the jazz chant leader. Pupils were observed to be attentive to other pupils during discussion periods and other activities. Pupils' work was displayed in all classrooms.

TABLE 2

OBSERVATION CHECKLIST: TEACHER (N=8)

Activities	% of Teachers Observed
1. Encourages children to work independently	75%
2. Encourages children to work together	88%
3. Talks with children about their activities for the instruction period	100%
4. Works along with children	88%
5. Helps children solve academic problems	100%
6. Encourages/reinforces children in their work	100%
7. Gives feedback to children on their progress	100%
8. Pupil diagnosis/prescription	63%
9. General discussion with pupils	13%
10. Allows for pupil choice in activities	50%
11. Displays children's work in the classroom	100%

V. *SUMMARY OF INTERVIEW WITH ESL PROGRAM COORDINATOR AND FIELD SUPERVISOR*

Introduction

The interviews with the program coordinator and the field supervisor were both two and one-half hours long. The coordinator has been involved with this Title I program for 11 years—two years as a teacher, three years as a field supervisor, four years as acting coordinator, and one year as coordinator. The supervisor had been in the program as a teacher for six years and as a field supervisor for the past four months. Their responses are reported together when the two agree; when they disagree, their responses are differentiated.

Program Considerations

Goals. Both the field supervisor and the program coordinator identified the goal of the program to be instruction in English—providing the child with both a knowledge of the language as well as the culture. They added that the child is made to feel confident in adjusting to the new environment by having teachers refer to the pupils' native culture and help the child retain the native language. The development of these goals has been on-going. The Title I coordinators, teachers, administrators and general staff contribute to this on-going process. The field supervisor stated that the implementation of these goals has changed since the beginning of the program. Initially the focus of the instruction was audiolingual; today it is eclectic. The field supervisor stated the curriculum has changed since the beginning of the program and the goals have become comprehensive.

Strengths and Needs. The greatest strength of the program was identified as the high level of teacher training and dynamics—all teachers have ESL skills. There are a variety of materials to meet the needs of the individual student, a result of the teachers' input in ordering

these materials. In addition, the good organizational structure was seen as a strength of the program. When asked what parts of the instructional program were in need of strengthening, the field supervisor felt that he needed to spend more time in the field; he felt that there were too many nonfield responsibilities which limited his time. The program coordinator also indicated a need for more time to see the teachers and make classroom observations. The program coordinator also felt that more teacher training demonstrations were needed so that the teachers could and would implement the curriculum more effectively.

Next year the curriculum is being revised. Some cognitive goals are being expanded or combined, and there will be modifications in the sequencing of instructional items.

Purpose of the Program Assessment. The program assessments give an overall picture of the students' achievement by testing the individual's receptive and productive language. The program used standardized tests and oral language interviews to diagnose and assess pupil achievement. The program coordinator feels, however, that the informal day-to-day evaluations provided the most meaningful assessments.

Instructional Considerations

Approaches to Instruction. An eclectic approach to instruction is utilized in the ESL program. This includes speakers, demonstrations, traditional teaching methods, jazz chants, textbooks, and silent reading. Teachers stated that they used any method that would help to motivate the students. Audiolingual methods are also used.

Daily Lesson. The daily lesson is correlated to the curriculum guide and usually includes a greeting, review of items, audio-visual presentations, practice of newly taught items, and an evaluative summary.

Motivation. The coordinator and field supervisor were asked the question, "What methods and techniques are

teachers expected to use in motivating students?". There response was that teachers use any method and/or technique that is appropriate to the level of the students, and that will serve to motivate the students.

Overlap Between What is to be Taught and What is Tested. Regarding standardized program assessments, the overlap between what is taught and what is tested is rather limited in the SAT test, but a bit more satisfactory in the TOBE instrument. However, informal teacher assessments address themselves completely to the content that is taught.

Introducing New Ideas, Approaches, Topics. In the past three years, there has been a shift in the methodology from an audiolingual focus to one that is more eclectic, including greater emphasis on reading. New ideas, approaches, and topics were introduced after the initial assessment of need and followed by discussions, by groups of teachers interested in the curriculum and proposed changes.

Student Considerations

Reporting of Student Progress. Student progress is reported to students by immediate feedback and unit-end assessments. Feedback is given to parents at various times during the year through progress reports (See Appendix), parent meetings, and demonstration lessons. The principal as well as the classroom teacher gets on-going feedback on the progress of the pupils.

Retention of Students. Retention of students in done according to the mandate to serve those with the greatest needs. There is no set rule for how long a student may remain in the program, but it is usually no more than three years. The total time may depend upon the amount of student-teacher contact.

Personnel Considerations

Supervisory Staff's Responsibilities. The supervisory staff makes site visits for the purpose of giving addi-

tional assistance and monitoring the program. Every teacher is formally evaluated once a year. The program coordinator stated that she meets regularly with the other Title I coordinators. In addition, the supervisory staff meet with the principals, the Title I staff, the paraprofessionals and parents to discuss aspects of the program and possible changes.

Strengths and Needs of Instructional Staff. The teachers' enthusiasm, their willingness to innovate, and their training are seen as the strengths of the instructional staff. The program coordinator stated that teachers need to become stronger in the area of record keeping. New forms were to be developed this coming year to help in this area. The field supervisor indicated that the teachers need to expand their awareness of the cultures of the pupil target population.

Recommendations

General. The program coordinator suggested that there be earlier identification of Title I eligible students, as well as an earlier allocation of monies. The field supervisor added that there is interference with the initial teacher placements because of budgetary problems.

Staff Development. Additional training sessions were recommended for the teachers. The field supervisor suggested more input from outside agencies.

Materials. It was recommended that more monies be allocated to allow a wider variety and a larger number of materials, especially textbooks.

Para-professional Services. The field supervisor recommended that para-professionals assigned to this program be screened adequately for linguistic preparation in order to serve as models for the pupils even though the Title I program has no control over the selection of paraprofessionals. This selection is made by the Community School Districts.

Pupil Selection. No recommendations were made in this area. Both the program coordinator and the field supervisor felt satisfied with this process.

Coordination with Regular Classroom Teachers. Although there is informal contact, the program coordinator suggested that structures be studied within the constraints of the present regulations to increase the communication between the ESL teacher and the regular classroom teacher.

Coordination with Other Title I Staff. The program coordinator felt that this coordination was good. The field supervisor recommended that the guidance personnel address the ESL staff. He also suggested that there be more interaction of cognitive skills gained in the ESL classes with those gained in reading, language arts, mathematics, etc.

VI. *EVALUATION CONCLUSIONS AND RECOMMENDATIONS*

The Title I English as a Second Language Program offers teachers a wide variety of materials and approaches to utilize in teaching English. The teaching approach was characterized by the teachers and the program coordinator as eclectic. Overall, teachers appeared enthusiastic about the program and offered praise for the materials and staff development received during the year.

In all classrooms visited, teachers were observed encouraging and reinforcing children at work. The atmosphere in many of the classrooms was lively. Jazz chants were used effectively to develop pattern drills; children appeared to especially enjoy this activity.

A recommendation voiced by 26% of the teachers and the program coordinator was that efforts be made, within the program guidelines, to increase communications between the classroom teachers and English as a Second Language. The evaluation team supports this recommendation.

Regarding the implementation of the revised curriculum during the 1980-1981 year, the following recommendations are offered: 1) efforts should be made to monitor the implementation of the revised curriculum, 2) obtain feedback on the effectiveness of the curriculum from classroom teachers, and 3) the impact of the curriculum on program objectives should be assessed.

The last recommendation relates to the development of the program assessment instruments. The program coordinator stated the information presented on the standardized test, did not adequately overlap with the program's curriculum and instructional objectives. Therefore, it is recommended that the program administrators begin to develop more appropriate program assessments.

DEFENDANTS' SUPPLEMENTAL EXHIBIT E

OEE
EVALUATION
REPORT

FINAL EVALUATION REPORT
ESEA TITLE I
Project Identification Number: 5001-64-01626

ESEA TITLE I
NONPUBLIC SCHOOL PROGRAMS
CLINICAL AND GUIDANCE SERVICES
1979-1980

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I. *PROGRAM DESCRIPTION*

The Title I Clinical and Guidance Services Program, hereafter called the Clinical and Guidance Program, served 8,662* nonpublic school students in grades K-12 at 178 sites. These students received Title I instructional services and were judged to be in need of clinical and/or guidance services. The basic assumption underlying this program, as stated by the Title I Nonpublic School Director, was that

> . . . a large number of pupils who participated in our program suffer educational deprivation for a variety of causes encompassing physical, intellectual, emotional and social development. The remediation process cannot attempt to deal only with one causative factor in isolation, and ignore the other determinants that may be interfering with the child's academic progress. Thus, we provide remediation through a multiple thrust of instructional and supportive programs, which provide of equal importance in compensation, for the multiple causes of the child's educational deprivation.

The major components of the program were individual and group sessions with guidance counselors, social workers and/or psychologists.

Students entered the Clinical and Guidance Program through referrals by the Title I instructional teacher, the nonpublic school classroom teacher or the principal. A pre-rating scale was completed for each child that was accepted into the program. (See Appendix). The guidance counselor and/or social worker determined which approach was best suited to the student and provided the needed services. The clinical and guidance staff might refer a pupil for diagnostic evaluation to a psychologist

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* Duplicated count, students could be enrolled in more than one Title I Instructional Program.

who served groups of schools on a pupil referred basis. If students were diagnosed as having physical and/or intellectual deficiencies that required special education, they were referred to the appropriate place (i.e. classes for brain injured pupils, certified retarded or mentally defective, emotionally handicapped, etc). The program also provided individual and group work with parents of referred pupils. Nonpublic school classroom teachers and Title I instructional teachers were invited to case conferences and were involved in formulating treatment plans.

The program operated under the regular practices and procedures of the Bureau of Child Guidance and the Bureau of Educational and Vocational Guidance. The staff included 3.5 full-time equivalent (FTE)* supervisors, 1.5 FTE coordinators, 72 FTE guidance counselors, 9.9 social workers, 23.9 FTE psychologists and 526 hours of time of psychiatrists. In addition, secretaries and clerks were employed by the program.

The purpose of this evaluation report is to report student achievement data, describe program implementation from the teachers' and coordinators' perspectives, and to indicate directions from a more in depth evaluation during the 1980-81 year.

II. *DATA ANALYSIS*

Evaluation Objectives And Tests Used

Students referred to the Clinical and Guidance Program were to achieve gains in performance in reading, mathematics, and English as a second language (ESL), greater than would have been expected in the absence of treatment. Student achievement was evaluated according to the USOE Model A1, using the pretests and posttests administered in the Title I instructional programs.

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* FTE: One FTE is equivalent to one full-time staff position. Some staff persons are hired on a part-time or per diem basis; therefore, the amount of services is expressed in FTE's in lieu of reporting the number of staff employed.

Reading improvement was evaluated on the basis of the performance on the Stanford Early School Achievement Test, for pupils in grade 1; the Stanford Diagnostic Reading Test, for pupils in grades 2 through 8; and the Stanford Test of Academic Skills, for pupils in grades 9-12.

Mathematics achievement was evaluated on the basis of the performance on the Stanford Early School Achievement Test, for pupils in grade 1; the Stanford Achievement Test for pupils in grades 2-8; and the Stanford Test of Academic Skills, for pupils in grades 9-11.

Student performance among those students receiving services from the Clinical and Guidance Program and ESL was not evaluated. This was done because the standardized instruments used in ESL have not been normed on appropriate populations and could not be expressed as Normal Curve Equivalents (NCE's).

Analyses Performed And Results

Performance gains as determined by standardized tests. In order to determine performance gains in cognitive areas, it was necessary to identify the test records of students receiving clinical and guidances services. A computer match was performed between the test record files submitted for the Title I instructional programs, and the file identifying students receiving clinical and guidance services. The computer retrieved all students whose names and schools were coded identically on the two sets of files.

From "retrieved" students, all records were selected for analysis which met the following criteria: pretest and posttest raw scores were available; and the raw scores could validly be expressed as Normal Curve Equivalents. The effect of this criterion was to exclude (1) students tested out-of level (because fall or spring norms were

lacking); (2) all ESL tests (which lack full sets of norms valid for ESL students).

There were 4,341 test records available for analysis for students in the Corrective Reading Program, 368 for students in Reading Skills Centers, and 3,204 for students in the Corrective Mathematics Program. Scores for these students are presented in Tables I, II, and III.

These data on the academic performance of pupils do not separate the influence of the remedial instruction from the gains attributed to the Clinical and Guidance Program. To separate these two variables is not possible within the framework of the present program. First, no fair comparisons can be made between children receiving clinical and guidance services *plus* remedial instruction with children *only* receiving remedial instruction, since all children needing clinical and guidance services are referred for service, and are by definition, "different" than those not being referred for services. To randomly select children, who need services, to become part of a control group not to receive service would be considered unethical by school staff and in violation of the Title I guidelines.

Second, since the children receiving clinical services have problems which inhibit their academic progress, one cannot assume that these children will perform better than or as well as other remedial students not receiving clinical and guidance services.

The third factor is an extension of the above two factors. One cannot measure the effects of varying hours of service received from clinical and guidance for two reasons; receiving more hours of service does not mean higher gains since the child with more severe problems received more hours of service; and, no baseline academic performance (performance of children needing clinical and guidance services, but- not receiving them) can be obtained from which to calibrate NCE gains based on hours of service.

However, the children receiving clinical and guidance services do show NCE's gains. This is commendable since these children, already receiving remedial services, were identified as having problems further affecting their academic performance.

Although there is no true comparison group, one could compare a pupil's rate of growth the year before receiving clinical and guidance services with his or her rate of growth the first year in the Clinical and Guidance Program. If it were possible to explain all of the effects of the intervening variables such as maturation, history, etc., the effects of the Clinical and Guidance Program could be better assessed. Similar case study methods are currently being used to study treatment effects on individuals where comparison groups do not exist or are not relevant.

TABLE I

TEST RESULTS FOR CORRECTIVE READING STUDENTS RECEIVING SERVICES FROM CLINICAL AND GUIDANCE

Grade	Test	N	NCE (mean) Pretest	NCE (mean) Posttest	NCE gain
1	SESAT—Environment	73	22	32	10
	SESAT—Aural Comp.	76	24	33	9
	SESAT—Letters & Sounds	75	33	40	7
2	SDRT Red	536	27	33	6
3	SDRT Green	680	25	37	12
4	SDRT Green	749	28	35	7
5	SDRT Brown	696	24	34	10
6	SDRT Brown	529	25	35	8
7	SDRT Brown	347	28	35	7
8	SDRT Brown	239	28	39	11
9	Level I	201	14	23	9
10	TASK Level I	112	17	23	6
11	TASK Level II	26	7	21	14
12	TASK Level II	2	18	25	7

TABLE II

TEST RESULTS FOR READING SKILLS CENTER STUDENTS RECEIVING SERVICES FROM CLINICAL AND GUIDANCE

Grade	Test	N	NCE (mean) Pretest	NCE (mean) Posttest	NCE gain
4	SDRT Green	31	25	36	11
5	SDRT Brown	74	24	35	11
6	SDRT Brown	83	23	34	11
7	SDRT Brown	95	26	35	9
8	SDRT Brown	85	28	39	11

TABLE III

TEST RESULTS FOR CORRECTIVE MATH STUDENTS RECEIVING SERVICES FROM CLINICAL AND GUIDANCE

Grade	Test	N	Mean NCE Pretest	Mean NCE Posttest	NCE gain
1	SESAT	24	30	51	21
2	SAT, PRIM 1	427	27	32	5
3	SAT, PRIM 1	570	25	32	7
4	SAT, PRIM 3	586	28	37	9
5	SAT, INTERM 1	564	29	34	5
6	SAT, INTERM 2	426	27	36	9
7	SAT, ADVANCED	250	27	36	9
8	SAT, ADVANCED	172	28	34	6
9	TASK Level I	100	30	39	9
10	TASK Level I	69	31	36	5
11	TASK Level I	15	*	*	*
12	TASK Level II	1	17	29	12

* Although Level II was specified in the evaluation design, Grade II students were actually tested with TASK, Level I. Eleventh grade norms are unavailable for Level I, so that results are not reported for this grade.

II. [sic] *CLINICAL AND GUIDANCE STAFF INTERVIEWS SUMMARY*

Introduction

Data for this section of this report were collected in seven schools during the period from May 19, 1980, to June 6, 1980. The sites were selected randomly from a stratified sample of schools in the Title I Clinical and Guidance Program. A small random sample of clinical and guidance staff were also interviewed in order to identify areas for more intensive evaluation during 1980-1981. The interview form was constructed, pretested and revised by the Office of Educational Evaluation with the assistance of Title I central administrators. The interviewer was trained in the use of the form before the interviews began. All interviewed personnel were informed that the purpose of the interview was to feed information back to the program coordinators and the Office of Educational Evaluation. They were assured complete confidentiality and anonymity to their responses. Each interview took between 15 and 60 minutes. The average time for the interviews was 34 minutes.

This section of the report is based on interviews with eight guidance counselors, three psychologists and one social worker.

The functions of the various clinical and guidance staff are as follows:

> *The Guidance Counselor shall:* study pupil needs through the examination of records, observation, consultation, and interviews; assist pupils in evaluating their abilities, aptitudes, attitudes, and interests and interpret these in planning appropriate intervention; provide individual and group counseling; develop group techniques as a method of providing educational guidance, career exploration and developing insight into personal and social problems;

interpret pupil data to staff members and cooperatively plan and carry out measures to meet pupil needs; interpret pupil data to parents and seek parental cooperation in formulating and carrying through appropriate plans; work with special school services such as the Evaluation and Placement Units to insure that identified pupils are placed in optimum situations and cooperate with community agencies to provide services to referred pupils.

The School Social Worker shall: study the child, particularly his/her family and life situation, to discover physical, social or emotional factors which have inhibited learning; provide individual and group therapy to students which will facilitate the development of satisfactory interpersonal relationships and work habits; assist the learning disabled student by working both with the child and with the parent; help the staff and parents to respond to the student through new prescriptive approaches which make learning a more satisfying and positive experience.

The School Psychologist shall: study referred children and, through the use of psychological techniques, evaluate intelligence and achievement levels, growth and adjustment; participate in case conferences and offer suggestions to instructional staff for prescriptive approaches to reverse patterns of academic failure; provide therapy for children and their families both individually or in groups in order to help facilitate more satisfying ways of coping both in the learning and total life situation; confer with parents of pupils with special learning disabilities to extend their understanding of their child's problems and, if indicated, elicit parental cooperation in effecting special class placement.

The Psychiatrists shall: Examine those pupils referred by the counselor, social worker or psychologist

where psychiatrict [sic] diagnosis is necessary in order to effect proper placement and to define treatment needs and goals.

Major Focus For Improvement of Pupil Functioning In Academic Areas

Respondents were asked: "In accordance with the Title I guidelines, what are the major areas of focus of the clinical and guidance component to improve pupil functioning in the academic areas?" Most answers regarded helping underachieving students to realize their full potential by working on learning and/or emotional problems that might be causing the underachievement.

The Clinical and Guidance Program staff perceived their role to be a liasion between the school, the parents, other professionals (e.g., psychologist, guidance counselor, etc.), the public school system and outside agencies. All of the interviewed staff indicated that their major foci were individual counseling, consulting with Title I nonpublic school staff, serving as a resource person, and enlisting parental aid. Also mentioned as areas of major focus were group counseling (92%), and diagnosing learning difficulties (67%).

Activities And Duties

All of the clinical and guidance personnel were asked to specify their duties and activities. The response of the one school social worker interviewed was: (1) to encourage teachers to respond to the child through individualized approaches; (2) to encourage parents to respond to the child through individualized approaches: (3) to counsel parents, students, teachers and principals; (4) to make referrals to other community agencies; (5) visit homes; (6) to study the family and life situations of the child to identify problems; (7) to provide individual and group therapy to students; and (8) to counsel the learning disabled child and family.

Three school psychologists were interviewed. When asked to state their duties and activities, all three responded: (1) to evaluate intelligence and achievement levels; (2) to evaluate learning patterns; (3) to participate in case conferences; (4) to advise instructional staff on helpful prescriptive approaches (5) to confer with parents of learning disabled children; (6) to elicit parental cooperation for appropriate placement; (7) to interpret test findings to parents; (8) to interpret test findings to teachers. Two of the three also said their activities included monitoring the child's progress, classroom observations and referrals to outside agencies.

When asked to identify main duties and activities, the eight guidance counselors all responded: (1) to examine records, observe, consult and interview to determine pupil needs; (2) to plan interventions; (3) to provide individual and group counseling; (4) to develop group techniques for providing guidance; (5) to plan cooperatively with parents; (6) to work cooperatively with special school services on placements; and (7) to cooperate with community agencies to provide services to referred pupils. Most of the staff also indicated that their duties included assisting pupils in self evaluations, interpreting pupil's self evaluations, interpreting pupil data to the other staff, interpreting pupil data to parents and planning cooperatively with the staff. Two guidance counselors also said they help provide information to the students about high school placement.

Pupil and/or Program Records

All of the clinical and guidance personnel indicated that they keep pupil and program records. All of the personnel kept contact sheets, case lists, weekly or monthly logs and referral sheets. Also mentioned were eligibility lists, pre- and post-rating scales (submitted by the referring teacher for each child), parent contact forms, confidential case files, and consent forms.

Supportive Services

Central Staff. Clinical and guidance personnel were asked what supportive services they received from Title I supervisory staff. All of the personnel mentioned supervisory visits, supervisory guidance and evaluations, in-service training, and materials.

In addition to the purchase of bulk materials for the total program, the clinical and guidance staff are provided with a cash allotment in order to individualize the purchase of manipulative materials.

Other Adults. Response was fairly consistent to the question, "When you are working with pupils to enhance their academic functioning, what adults do you involve in your treatment plan?" All clinical and guidance personnel indicated the parents and/or family, the Title I referring teacher and the regular classroom teacher. Most named the principals and some interviews also mentioned other clinical and guidance staff and the Title I instructional staff.

Recommendations

General Recommendations. General recommendations made by more than one clinical and guidance staff member included: (1) provide more days in each school, more staff and more clinical and guidance services (that is, expand the program to serve more children; (2) broaden the guidelines to allow more time for other services (i.e. workshops); (3) more Title I classes, perhaps for learning disabled children; (4) provide more work with community resources; (5) set aside more space in schools; (6) provide telephones for Title I personnel. One of the psychologists recommended research in preventive techniques and psychologists training in group dynamics.

Staff Development. Several of the staff members suggested additional workshops that focus on refining professional skills, learning about new laws and new diag-

nostic instruments, and sharpening sensitivity to peoples of other cultures.

Materials. Staff members stated they would like additional materials including more professional reference books and manipulative materials.

Pupil Selection. Selection of the students to the Clinical and Guidance Program is made by the clinical and guidance staff member together with the Title I teacher from among eligible students serviced in the Title I instructional programs. Many staff members expressed frustration at not being able to work with students who were not enrolled in any Title I instructional program, since the staff had requests to service them.

One staff member suggested setting up a maintenance system to follow-up on students discharged from the Title I instructional programs.

Coordination with Regular Classroom Teachers. Most of the interviewers said they meet with the regular classroom teachers informally, usually at lunch, since many teachers in the nonpublic schools do not have any free time. In addition, one teacher mentioned the importance of have definite times scheduled at the beginning of the school year for student appointments in order to facilitate cooperation between the Title I clinical and guidance staff and the nonpublic school classroom teacher.

Classroom teachers are invited to all case conference at which time individual student progress is assessed. Classroom teachers are also involved in formulating comprehensive treatment plans.

Coordination With Other Title I Staff. Eleven members (83%) of the clinical and guidance staff expressed satisfaction with the coordination with other Title I Staff. During formal and informal conference periods student progress was discussed. Two staff members found it difficult to meet with other staff members because of conflicting schedules and staff changes.

IV. *SUMMARY OF INTERVIEWS WITH PROGRAM COORDINATORS*

Program Consideration

Goals. The aim of the program was to help children function better in the basic areas of reading and mathematics. The program approached their goal by obtaining a diagnosis of the child's behavioral problems. These goals were developed with the academic progress of the child as the primary end. The clinical and guidance staff focussed on problems that might be interfering with academic progress.

Strengths and Needs. The clinical and guidance services were provided to students who demonstrated the greatest need for them. An interdisciplinary approach, a staff of highly trained professionals, and a good ratio of staff to children were all seen as program strengths.

The greatest need of the program was additional staff to service more children (i.e., accoridng to the staff perception).

New Ideas/Approaches/Topics. Over the last three years program changes included increased internal referrals, increased conferences with the nonpublic school teachers, and more emphasis on working with parents and the community.

Student Considerations

Frequently Occurring Problems. Underachievement was named by both coordinators as the most frequently occurring problem. They also mentioned "acting out" and withdrawn behavior as problems. One coordinator named family problems and the ability to relate to others and the other mentioned physical problems (obesity, hyperactivity and mental retardation) as the other common problems.

How Students were Referred. Students were referred to clinical and guidance services by the Title I instruc-

tional teacher, the regular classroom teacher and/or the nonpublic school principal.

How Students were Diagnosed and Evaluated. The clinical and guidance staff classroom teachers are in constant communication about the child's progress. When it becomes apparent that all of the variables which indicate change in personality show positive progress, the child is seen less often in counseling. Improved grades on report cards and testing, and positive teacher comments on behavior, form the multiple criteria for closing a case.

Social workers generally took social histories and used this information in working out a treatment plan for the child.

Guidance counselors used the pre- and post-rating form that were filled out by the referring teachers; these checklist of behaviors are the teachers evaluation of the child's needs. (See Appendix.) In addition to the teacher ratings, the counselors also conducted informal interviews with the child. All of the available information on the child is used to make a treatment plan for the child. Notes were kept in individual files on each child seen by the counselor.

How Students Were Reassessed. The child's progress was discussed with the Title I instructional teacher and regular classroom teacher; recommendations for different approaches were made if the child was not improving. This reassessment was done on a regular basis.

How the Interpretation of Diagnostic and Evaluation Procedures was Reported to Parents. Parents were involved from the beginning. They gave their consent before any testing was done and then were given feedback after the evaluation was completed. The principal, the classroom teacher, and the Title I instructional teacher were also informed of the diagnostic findings.

When Services were Ended. Treatment was terminated if the child showed academical and behavioral improvement.

Participant/Staff Ratio. Participant-staff ratio for program activities varied from one to one, to a small group meeting, (six to eight pupils) or to a larger group setting for pupils, parents and instructional staff members.

Frequency of Instruction. Duration and frequency of activities varies directly with the needs of the individual, the type of activity and the availability of staff as well as the number of days of service in a school.

Emergencies. Emergencies that occurred included aggressive and violent behaviors, suicide threats and family break-ups. The clinical and guidance staff dealt with the immediate crisis by talking to the persons involved—the child, the parents, the teacher—and referral was made to an outside agency for continuation of treatment if the child was not enrolled in any Title I instructional program.

Staff Considerations

Staff Involvement with the Title I Teacher and the Regular Classroom Teacher. A team approach was used. Clinical and guidance staff met with Title I teachers and the regular classroom teachers to discuss individual cases.

Outside Agencies. The length of time taken by outside agencies to respond to referrals varied depending on the agency and its location.

Materials. According to the coordinator, counselors are given a shopping bag full of materials to supplement the supply of manipulative materials which have been maintained at each site throughout the entire history of the program. Counselors are told that they may individualize their purchases when they are given their allotments each year. They also are informed that they may request reference books for the library. Puppets are routinely provided each year and some counselors have chosen to buy doll houses.

Recommendations

General. General recommendations included providing more supervisors and staff and building in more time for training and staff development.

Regarding staff development, last year at least seven unpaid speakers and workshops leaders volunteered their time to the Guidance Program. These volunteers came from a variety of places including state agencies, mental health clinics, hospitals and priviate [sic] institutes.

V. *EVALUATION CONCLUSIONS AND RECOMMENDATIONS*

The following concerns were expressed by Clinical and Guidance Services personnel during interviews with the evaluation concultant: [sic]

1) Clinical and guidance staff members expressed a desire to be included in the other program component staff meetings.
2) Lack of adequate space was seen as a problem in some of the schools.
3) Staff members voiced a need for more staff development.

The evaluation team recommends that the program coordinators discuss these issues with the staff during meeting times and explore ways of solving these problems within their legal and budgetary restraints.

The program coordinators expressed a desire to revise the Behavior Rating Scale. The revision of this scale has been identified by the Office of Educational Evaluation as a priority area for the investment of effort for 1980-1981.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 78C-1750

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HIRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION; and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

AFFIDAVIT

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

JOHN F. STAEHLE, being duly sworn, deposes and says:

1. I am Deputy Director of Compensatory Education Programs, Office of Elementary and Secondary Education, United States Department of Education ("ED"). I have worked at the Federal level on the program under Title I of the Elementary and Secondary Education Act of 1965 ("Title I") since its inception. Prior to assuming my present position, I served as Director of the Division of Grants, Policy and Administration in the Office of Compensatory Education in the U.S. Office of Education. My official duties include the immediate supervision of ED personnel charged with administering Title I at the

Federal level, and advising State educational agencies, and through them, local officials charged with administering Title I at the State and local levels. The statements in this affidavit are based on my personal knowledge except where otherwise indicated.

2. I understand that this affidavit is to be submitted as part of the trial record on behalf of defendants in this lawsuit. The purpose of my statements in this affidavit is to supplement and update the affidavit of Genevieve Dane dated April 20, 1979, originally filed in the case of *National Coalition For Public Education and Religious Liberty, et al. v. Harris, et al.*, 489 F. Supp. 1248 (D.S.D. N.Y. 1980). My official duties are virtually identical to those performed previously by Genevieve Dane.

3. Fiscal Year 1982 funds are currently being expended. The amount of Title I appropriated for Fiscal Year 1982 is $3,104,317,000. According to the most recent available data, Title I services in the 1980-81 school year were provided to 5,170,935 public school children and 192,994 private school children. Based on these figures, about 3.7% of the participants in the Title I program attend private schools. It is estimated, according to the latest available data, that about 4% or $105,200,000 of the Title I appropriation for Fiscal Year 1980 was spent on services for private school children.

/s/ John F. Staehle
JOHN F. STAEHLE

Sworn to before me this 12th day of May 1982.

Richards Warhome
Notary Public

My Commission Expires
May 15, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 Civ. 1750

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS, INTERVENOR-DEFENDANTS

REPLY AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STANLEY GELLER, being sworn, states the following:

1. I am the attorney for the plaintiffs in this action. I submit this affidavit in opposition to defendants' cross-motion for summary judgment and in further support of plaintiffs' motion for summary judgment.

2. I have been asked by Leo Pfeffer, Esq., who was the lead counsel for plaintiffs until April 22, 1982, to an-

nounce to the Court and opposing counsel that he has withdrawn as counsel for plaintiffs as part of his retirement, on the aforementioned date, from the active practice of law. I salute a great constitutional lawyer and champion of religious liberty.

3. The main purpose of this affidavit is to call this Court's attention to the Evaluation Reports submitted as exhibits to the affidavit of Lawrence F. Larkin, dated May 12, 1982, on behalf of defendant Macchiarola, as Chancellor of the Board of Education of the City of New York, in opposition to plaintiffs' motion and in support of defendants' motion. As the Court will see when it reviews the papers submitted in connection with both motions, there are five such Reports, one for each program of remedial services provided by the City of New York, with Federal Title I funds, to nonpublic schools within the City, almost all of which are religious schools.

4. It is respectfully submitted that those Reports, carefully read, demonstrate conclusively that the Title I Program of New York City violates the Establishment Clause of the Federal Constitution. More specifically, it is submitted that the Reports show (1) that the Program necessarily involves an ever-increasing entanglement of Church and State in New York City, (2) that the Program has the primary effect of aiding Church schools, as such, and (3) that there is little merit to defendants' "child benefit" theory in this case, to the extent that such theory saves the Program from being declared unconstitutional after *Meek*.

5. For the convenience of the Court, excerpts from the Evaluation Reports are set forth in the five exhibits annexed to this affidavit. The letter of each such exhibit corresponds to the letter assigned to it as an exhibit to the Larkin Affidavit.

6. The excerpts demonstrate that, with insignificant differences in numbers, each program of remedial services places each public school teacher (referred to in the excerpts as "Title I teacher") in constant, daily com-

munication with his religious school counterpart ("regular classroom teacher") and/or the religious school staff and principal. The resulting picture is completely at odds with that painted in defendants' papers, where the Title I teacher is depicted as if he or she were hermetically sealed off in his or her Title I classroom, or "school within a school," just as the materials used in that classroom are, allegedly, locked up whenever not in use. In actual fact, as stated in one of the excerpts, the Title I teacher works "as a team" with the religious school educators, as if he or she were an integral part of the school's faculty.

7. What follows from the foregoing, as the excerpts also show, are several things, first and foremost of which, for the purposes of the present case, is that there is an ongoing dialogue between the Title I teacher and the religious educators in which they exchange information and advice, not only concerning the activities of the Title I students within the Title I classroom and concerning their Title I curriculum, but also concerning the activities of the same students and their fellow students in their regular classroom and concerning the regular curriculum.

8. Before going into the significance of this dialogue, it is necessary to call attention to something else in the Larkin Affidavit, specifically in paragraph 5, where the affiant asserts how, since April 1979, when he submitted a similar affidavit in what plaintiffs call the *"Hufstedler"* case and defendants call the *"PEARL"* case, the New York City Title I program, has allegedly remained "religiously neutral." In spelling out what he means, the affiant alludes to an absence of what would constitute gross violations of such neutrality, such as a Title I teacher's "becoming involved with the religious activities of the nonpublic schools, ..." He ends with a reference to the fact that Title I classrooms are bare of "any religious statutes [sic], symbols, pictures or artifacts, ..."

9. To begin at the end of the aforementioned paragraph, the concept that a local government *avoids* a viola-

tion of the Establishment Clause by coming into a religious school and requiring the school authorities to strip from the walls of several rooms evidence of the religion normally observed in that school and in those rooms is in itself a curious one. It seems clear that an activity which impedes religion is as much a violation of the First Amendment as one which advances it, not to mention the "entanglement" involved in the government's continuous surveillance of the rooms in question to see that they remain stripped of thier [sic] normal evidences of religion.

10. There is, however, a more serious defect in paragraph 5 of the Larkin Affidavit in the light of the exhibits annexed to that document, which, as noted, disclose that there is an ongoing dialogue between Title I teachers and religious school personnel. At first blush, it might appear that the dialogue would concern only the subjects taught in the Title I curriculum (although there is hardly a clear line between reading, writing and arithmetic when taught in a "remedial" way—and when taught, previously or subsequently, in a "regular" way). After only slightly deeper consideration, however, it should become clear that the dialogue in question concerns *how to teach* those subjects, and, more particularly, how to teach them to problem students, since that is what Title I students are.

11. Viewed in this light, the ongoing dialogue between Title I teachers and religious school personnel assumes its proper proportions. In exchanging information and advice, the participants in the dialogue are not only constantly assisting each other in teaching their mutual wards, they are also constantly educating each other about how to teach their wards, and similar types of students, and even all types of students. Assuming, as we must, on the basis of common knowledge and abundant judicial authority, that there is a basically different approach to the educational process in a public school from that in a religious school, and that the latter process is based on values that derive from the religion observed in the school, it follows that the dialogue in question involves

a constant, although subtle "indoctrination" of each set of participants with the values of the other.

12. No one would venture to say which prevail, but it does not matter constitutionally. It is the dialogue and the indoctrination which is the evil. It is made more pernicious, moreover, by a fact which the Larkin Affidavit alleges, that the Title I teachers do not remain long in any one religious school, and presumably they do not remain permanently in religious schools. That fact, if it is the fact, is presumably used in the opposing affidavit in support of the proposition that it reduces the possibility of indoctrination, one way or the other. That would appear to be a doubtful proposition. What is *not* doubtful is that any Title I teacher who has taught in a religious school for any substantial length of time can properly lay claim to having first-hand knowledge of the educational process in that school. For better or for worse, he or she becomes a "missionary," who can say—"I have been there, and I know how it works (or fails to work or compares with public schools)." It seems clear that the First Amendment prohibits the training, intentionally or inadvertently, of government employees as such missionaries, whether they prove to be for or against religious schools.

13. At this point, a *caveat* is necessary. Although plaintiffs believe that the ongoing dialogue between Title I teachers and religious school personnel is proof of one clearly pernicious effect of the entanglement that necessarily results from the Program, it is not intended by submitting such proof to indicate that plaintiffs have the burden of proving the pernicious effects of the entanglement, as opposed to the entanglement itself. As pointed out in plaintiffs' accompanying memorandum of law, the vice in New York City's Title I Program insofar as it applies to religious schools is that it poses the constant threat of violations of the First Amendment which requires a "comprehensive, discriminating and continuing" surveillance of the Title I personnel posted in the religious

schools. *That* is the entanglement, and the ongoing dialogue between Title I teachers and religious school personnel serves to show, without more, how excessive it is in this case.

14. On the subject of surveillance, the Evaluation Reports are also significant. They demonstrate that there is in actual fact no real surveillance from the viewpoint of the First Amendment conducted by those in charge of the New York City Title I Program. There is not a word in the Reports evaluating the Program at year's end which indicates that the author or authors or their assistants asked a single question of the Title I teachers or other Title I personnel posted in the religious schools relating to violations or possible violations of the First Amendment, or that they were concerned with such violations.

15. As indicated above, there is another aspect of the ongoing dialogue between Title I teachers and religious school personnel disclosed in the exhibits annexed to the Larkin Affidavit which bears serious consideration from a constitutional viewpoint. The Evaluation Reports make it clear that the information and advice exchanged by the Title I teachers and religious school personnel is by no means confined to the activities of the Title I students in the Title I classroom or to the curriculum taught in that classroom, but extends to the activities of those students in their "regular" classroom and to the curriculum in that classroom. That aspect of the dialogue might, to some extent, be present in a program of remedial services conducted off the premises of the religious school, but it is compounded when the program is on the premises, and the program teachers are in constant communication with the religious school personnel, familiar with the regular classroom activities and curriculum, and, as noted above, virtually members of the faculty of the religious school.

16. That spilling over makes it impossible to separate the aid given by the Title I Program, as now in force, to

the Title I students, as such students, and the aid given by the Title I Program to the religious schools attended by those students. There is, however, an even more substantial obstacle to apportioning the aid given by any program of remedial services between the religious school students and the school they attend, whether off or on the premises of the religious school. It is clear, and the Evaluation Reports would make it so, if it were not, that the students who need such services would, without the benefit of the same, be a drag on the rest of the student body and, therefore, on the entire educational process in the religious school. Remedial services, therefore, in a direct educational way, help the religious schools, and cannot be sustained on any "child benefit" theory.

17. Lastly, the Larkin Affidavit notes that Title I nonpublic school allocation for the 1981-82 school year is over $20,000,000 and represents 13.5% of the citywide allocation. The amount of that allocation, of course, is in addition to the aid given to the same schools in the form of textbooks (in addition to Title I textbooks), certain instruction materials (again in addition to Title I materials), and to help the schools perform various testing and reporting services, which also runs into millions of dollars. What the Larkin Affidavit does not say, and what is unknown at the present time, except to the aided schools, is the total cost of operating those schools, and, therefore, the percentage the government aid bears to the total cost. It is respectfully submitted that the government aid, inclusive of remedial services, will be so substantial in amount as to make the phrase "establishment of religion," at least insofar as it relates to the maintenance of religious schools in this city, literally true in the narrowest sense of that phrase.

18. In light of the foregoing and in light of the points made and authorities cited in plaintiffs' initial and reply memoranda of law, I respectfully request that plaintiffs' motion for summary judgment be granted, that defendants' cross-motion be denied, and that judgment be en-

tered enjoining the continuation of the New York City Title I Program as now conducted in religious schools.

/s/ Stanley Geller
STANLEY GELLER

Sworn to before me this
27th day of May, 1982

/s/ Melvin J. Nelson
MELVIN J. NELSON

Notary Public, State of New York
No. 60-2864800
Qualified in Westchester County
Commission Expires March 30, 1983

PLAINTIFFS' EXHIBIT A

EXCEPTS FROM DEFENDANTS' SUPPLEMENTAL EXHIBIT A

(OEE Evaluation Report on Corrective Mathematics Services for 1979-1980)

Page 15 (top)

"*Student Records.* All interviewed teachers kept records of attendance test scores, pupils' progress, students' work, a checklist of skill mastery for each student, *a record of classroom teacher conferences and notes from their meetings with the nonpublic school principals.*" (Plaintiff's emphasis.)

Page 15 (middle)

"*Related Duties.* All of the interviewed teachers identified the following areas as duties related to teaching: administering standardized tests, diagnosing pupil needs, implementing instruction, participating in in-service conferences, preparing and maintaining lesson plans and pupil records, and conferring with parents. Other responses included: preparing instructional materials, organizing classrooms, *conferring with teachers and the principal*, preparing progress reports, listening to student problems, *helping with regular classroom mathematics*, and planning the schedules." (Plaintiff's emphasis.)

Page 15 (bottom)

"*Support Services*

Clinical and Guidance. The survey asked teachers to identify those staff members who referred pupils for clinical and guidance services; 91% checked the Title I Corrective Mathematics teacher, 85%, other Title I non-public school teachers; *83% class-*

room teachers; 75% principals; . . . ." (Plaintiff's emphasis.)

Page 16 (bottom)-Page 17 (top)

"*Nonpublic School Principal.* Eighty-five percent of the surveyed teachers responding to the questionnaire indicated that the nonpublic school principal provided orientation to school procedures. Sixty-two percent reported the principal arranged scheduling, 18% indicated the principal held monthly conferences and 16% checked that the principal arranged conferences with the regular classroom teachers. Most of the teachers interviewed found the principals to be cooperative and available when necessary. Eighty-three percent of the interviewed teachers reported that the principal encouraged coordination with the regular classroom teacher. Sixty-seven percent indicated that the principal also provided support in the areas of orientation to the school scheduling and pupil related conferences."

Page 31

"The school principal is given a copy of each child's September and May Stanford Achievement Test scores. *The supervisor also indicated that teachers maintain an on-going dialogue with the principal.*" (Plaintiffs' emphasis.)

PLAINTIFFS' EXHIBIT B

EXCERPTS FROM DEFENDANTS' SUPPLEMENTAL EXHIBIT B

(OEE Evaluation Report on Corrective Reading Services for 1979-1980)

Page 8

"*Criteria for Selection.* Interviewed teachers were asked to identify the criteria used for selecting pupils for the Corrective Reading Program. Ninety-two percent of the teachers indicated the criteria provided by the eligibility list were used for selection. Other responses included: severely disabled readers (83%), *classroom teacher recommendations (50%) and principal recommendations (33%).*

Participants in Selection. Survey respondents indicated that the following people participated in the selection process: Title I teachers (92%), the guidance counselor (44%) and other Title I teachers (29%).

All 12 interviewed teachers said the non-public school Title I guidelines were used in the selection of students. *The teachers reported participants in these decisions included the Title I teacher (reported by 75% of the respondents), the classroom teacher (83%) and the school principal (75%).*" (Plaintiffs' emphasis.)

Page 17

"*Clinical and Guidance.* The survey asked teachers to identify all those who referred pupils to the Clinical and Guidance Services: 96% of the teachers indicated the Title reacher; [sic] 88%, *classroom teachers; 82%*, other Title I teachers; *82%, the principal*; and 15%, parents." (Plaintiffs' emphasis.)

Page 18

"*Nonpublic School Principal.* Eighty-two percent of the survey respondents indicated the school principal provided orientation to the school; 61% reported that the principal arranged scheduling; 24% state the principal arranged monthly conferences and 14% that the principal arranged conferences with the regular classroom teachers."

Page 19

"*Classroom Teacher.* Surveyed teachers indicated the purposes for consultation with the regular classroom teacher as: assessing pupil needs and weaknesses, 85%; selecting pupils, 80%; coordinating scheduling, 72%; and motivating the interest of pupils, 42%.

All interviewed teachers consulted with the regular classroom teacher to assess pupil needs and weaknesses and to coordinate scheduling. Seventy-five percent of the teachers added that they use the consultations *to find out what the classroom teachers are teaching and/or coordinate lessons with the classroom teacher.* Other purposes noted were discussions of pupil behavior and the sharing of test scores." (Plaintiffs' emphasis.)

Page 25

"*Coordination with the Regular Classroom Teacher.* The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupils achievement and progress reports are reviewed with *nonpublic* school staff.

Teachers suggested that there should be even more conferences with the regular classroom teachers. It was also suggested that invitations should be ex-

tended to the Title I teachers to attend the nonpublic school faculty meetings." (Plaintiffs' emphasis).

Page 29

"Table 5 lists the observed teacher activities. All of the observed teachers talked with the children about their activities, encouraged and reinforced children in their work and gave feedback to children on their progress. *The evaluator observed that 92% of the teachers helped children solve academic problems and engaged in general discussions with the pupils.*" (Plaintiffs' emphasis.)

Page 35

"Communication between the teachers and the principals is encouraged. The principals must see and sign all the reports to the parents (issued twice a year). They also receive test scores for each group. *In most schools the principals also have informal conferences with the Corrective Reading teachers.*"

PLAINTIFFS' EXHIBIT C

EXCERPTS FROM
DEFENDANTS' SUPPLEMENTAL EXHIBIT C

(OEE Evaluation Report on Reading Skills
Services for 1979-1980

Page 1

"The staff included one full time (FTE)** coordinator, 17 FTE teachers, and one FTE secretary. Each teacher provides a minimum of four hours of instruction per day. *In addition, a one hour conference period was set up each day to be used by teachers to meet with parents, communicate with nonpublic school personnel, and to diagnose individual pupil needs.*" (Plaintiffs' emphasis.)

Page 7

"*Participants in Selection.* All of the surveyed teachers reported that the Title I teacher participated in the selection of the children *for the program. Other responses were nonpublic school principal, 81%; nonpublic school classroom teacher, 63%;* Title I guidance counselor, 50%; and other Title I teachers, 69%." (Plaintiffs' emphasis.)

Page 16

"*Nonpublic School Principal.* Teachers answering the survey indicated they receive support from the nonpublic school principal through orientations to school procedures, 81%; scheduling, 69%; arranging conferences with the regular nonpublic school classroom teachers, 44% and monthly conferences, 19%.

All of the interviewed teachers indicated that the *principal of their school encourages coordination with regular classroom teachers,* provides orientation to school procedures, and makes scheduling de-

cisions. Three interviewed teachers noted that they received support from their principals in the following ways: *the principal's attendance at the monthly conferences*, the principal's respects [sic] for the program, and the principal's assistance in gaining the cooperation of parents, students, and teachers." (Plaintiffs' emphasis.)

Page 19

"*Coordination with Regular Classroom Teacher.* The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupil achievement and progress reports are reviewed with *nonpublic* school staff." (Plaintiffs' emphasis.)

PLAINTIFFS' EXHIBIT D

EXCERPTS FROM DEFENDANTS' SUPPLEMENTAL EXHIBIT D

(OEE Evaluation Report on English as a Second Language for 1979-1980)

Page 7

"*Participants in Selection.* All interviewed teachers identified the Title I teacher as a participant in the selection of children for the program. *Eighty-eight percent of the teachers recognized the classroom teacher* and/or Title I guidelines as a determinant in the selection.

Of the 42 respondents to the survey, 98% indicated that the Title I teacher participated in the selection of the children in the program, 9% *named the nonpublic school principal, 100% selected the classroom teacher*, 17% named the guidance counselor and 43% named other Title I teachers." (Plaintiffs' emphasis.)

Page 10

"TABLE I

Percent of Title I ESL Teachers Using Various Assessments At the Beginning of the Year and During the Year

Assessments	Method used at beginning of the year	Method used during year
Title I program assessment	55%	55%
An informal reading test	2%	10%
A standardized norm referenced test	79%	67%
A standardized criterion referenced test	10%	12%
A teacher made criterion referenced test	52%	50%
Conference with classroom teacher	76%	81%
Classroom observation	0%	74%

(Plaintiffs' emphasis.)

Page 11

"*Student Records.* All interviewed teachers kept records of attendance, pre- and posttest standardized scores, individual profile charts, and pupil's work folders.

Most of the teachers kept records of parent conferences (88%), *conferences with nonpublic school staff* (*88%*), and referrals to supportive services." (Plaintiffs' emphasis.)

Page 12 (middle)

"*Support Services.* The results of the survey asking teachers to specify all those who refer pupils to Clinical and Guidance Services were: 98%, ESL Title I teacher; 81%, other Title I teachers; *98%, classroom teachers*; *81%, principals*; and 21% parents." (Plaintiffs' emphasis.)"

Page 12 (bottom)

"It was reported by the interviewed teachers that pupils are referred to Clinical and Guidance Services *by the classroom teacher* (*75%*) or the Title I teacher (63%). *Often the ESL teacher would talk to the regular classroom teacher informally and then decide to jointly request clinical and guidance services.*" (Plaintiffs' emphasis.)

Page 13

"When asked what kind of support they received from the nonpublic school principal, the eight interviewed teachers generally spoke of the principal's cooperation. All of the interviewed teachers indicated that the principal provided orientation to school procedures. Eighty-eight percent of these teachers reported that the school principals encouraged coordination with the regular classroom teachers, initiated or were available for dialogue with the Title I teacher, and took care of scheduling matters." (Plaintiffs' emphasis.)

Page 14

"Interviewed teachers reported that they communicated with parents in a variety of ways: face-to-face (63%); telephone (38%); written communication/written progress reports (100%); parent-tutorial (13%); *and through the classroom teacher (13%)*.

Initiation. Eighty-three percent of the Title I teachers indicated on the survey that they initiated the majority of teacher-parent contacts. *In addition, 5% named the nonpublic school classroom teachers*; 7% indicated the parents; and 2% reported the pupils initiated the majority of parent-teacher contacts." (Plaintiffs' emphasis.)

Page 16 (top)

"*Coordination with Nonpublic School Classroom Teachers.* The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupil achievement and progress reports are reviewed with nonpublic school staff."

Page 16 (middle)

"*Coordination with Regular Classroom Teachers.* The coordination with the regular classroom teacher, although informal, was *ongoing* and flexible. One teacher suggested the regular classroom teacher could observe some ESL classes." (Plaintiffs' emphasis.)

Page 21

"*Student Considerations*

Reporting of Student Progress. Student progress is reported to students by immediate feedback and unit-end assessments. Feedback is given to parents

at various times during the year through progress reports (See Appendix), parent meetings, and demonstration lessons. *The principal as well as the classroom teacher gets on-going feedback on the progress of the pupils.*" (Plaintiffs' emphasis.)

Page 23

"*Coordination with Regular Classroom Teachers.* Although there is informal contact, the program coordinator suggested that structures be studied within the constraints of the present regulations to increase the communication between the ESL teacher and the regular classroom teacher."

Page 24

"A recommendation voiced by 26% of the teachers and the program coordinator was that efforts be made, within the program guidelines, to increase communications between the classroom teachers and English as a Second Language. *The evaluation team supports this recommendation.*" (Plaintiffs' emphasis.)

PLAINTIFF'S EXHIBIT E

EXCERPTS FROM DEFENDANTS' SUPPLEMENTAL EXHIBIT E

(OEE Evaluation Report
on Clinical and Guidance
Services for 1979-1980)

Page 1

"Students entered the Clinical and Guidance Program through referrals by the Title I instructional teacher, *the nonpublic school classroom teacher or the principal.*" (Plaintiffs' emphasis.)

Page 2

"*Nonpublic school classroom teachers* and Title I instructional teachers were invited to case conferences and were involved in formulating treatment plans." (Plaintiffs' emphasis.)

Page 10

"*Activities And Duties*

All of the clinical and guidance personnel were asked to specify their duties and activities. The response of the one school social worker interviewed was: (1) to encourage teachers to respond to the child through individualized approaches; (2) to encourage parents to respond to the child through individualized approaches: (3) to counsel parents, students, *teachers and principals*; (4) to make referrals to other community agencies; (5) visit homes (6) to study the family and life situations of the child to identify problems; (7) to provide individual and group therapy to students; and (8) to counsel the learning disabled child and family." (Plaintiffs' emphasis.)

Page 12

"Response was fairly consistent to the question, "When you are working with pupils to enhance their academic functioning, what adults do you involve in your treatment plan?" *All* clinical and guidance personnel indicated the parents and/or family, the Title I referring teacher *and the regular classroom teacher. Most named the principals* and some interviews also mentioned other clinical and guidance staff and the Title I instructional staff." (Plaintiffs' emphasis.)

Page 13

"*Coordination with Regular Classroom Teachers. Most of the interviewers said they meet with the regular classroom teachers informally*, usually at lunch, since many teachers in the nonpublic schools do not have any free time. In addition, one teacher mentioned the importance of have [sic] definite times scheduled at the beginning of the school year for student appointments in order to facilitate cooperation between the Title I clinical and guidance staff *and the nonpublic school classroom teacher.*

Classroom teachers are invited to all case conference at which time individual student progress is assessed. Classroom teachers are also involved in formulating comprehensive treatment plans." (Plaintiffs' emphasis.)

Page 15 (top)

"*How Students were Referred. Students were referred to clinical and guidance services by the Title I instructional teacher, the regular classroom teacher and/or the nonpublic school principal.*" (Plaintiffs' emphasis.)

Page 15 (bottom)

"*How Students Were Reassessed.* The child's progress was discussed with the Title I instructional teacher *and regular classroom teacher*; recommendations for different approaches were made if the child was not improving. This reassessment was done *on a regular basis.*" (Plaintiffs' emphasis.)

Page 16

"*Staff Considerations.*

"*Staff Involvement with the Title I Teacher and the Regular Classroom Teacher. A team approach was used.* Clinical and guidance staff met with Title I teachers *and the regular classroom teachers* to discuss individual cases." (Plaintiffs' emphasis.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 888 (CHT)

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, Secretary of the United States Department of Health, Education, and Welfare, ET AL., DEFENDANTS

and

JAMES and BESSIE BOVIS, ET AL., INTERVENOR-DEFENDANTS

and

PHILIP and IDA FENSTER, ET AL., INTERVENOR-DEFENDANTS

AFFIDAVIT OF REVEREND MONSIGNOR JOHN J. HEALY

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK .)

REVEREND MONSIGNOR JOHN J. HEALY, being duly sworn, deposes and says:

1. I am the Secretary of Education and Director of the Department of Education of the Roman Catholic Archdiocese of New York. My administrative responsibilities include overseeing the education of 140,630 stu-

dents in the Catholic elementary and secondary schools in the Counties of Richmond, New York, Bronx, Westchester, Putnam, Dutchess, Rockland, Orange, Ulster and Sullivan.

2. I make this affidavit on behalf of the several defendants in this matter, with the understanding that it will be submitted to the Court as part of the joint exhibits to be filed by the several defendants.

3. I have been Secretary of Education of the Archdiocese of New York since August 1, 1978. From January 1, 1976, to July 31, 1978, I served as Deputy Secretary of Education. Prior to 1976, I served as Associate Secretary of Education.

4. In my position as Secretary of Education of the Archdiocese of New York, I have become familiar with the operation of the Catholic elementary and secondary schools within the Archdiocese. There are 287 Catholic elementary schools and 69 Catholic secondary schools in the ten counties that constitute the New York Archdiocese. Of that total number of schools, 159 Catholic elementary schools and 48 Catholic secondary schools are located in the Counties of New York, Bronx and Richmond, counties within the Archdiocese for which the New York City Board of Education has responsibility for the operation of the public school system. Approximately 95,698 students are enrolled in the Catholic elementary and secondary schools in those three counties.

5. In my position as Secretary of Education of the Archdiocese of New York, I have become familiar with the programs of remedial education made available through the New York City Board of Education to economically and educationally disadvantaged children who attend nonpublic schools in New York City under Title I of the Elementary and Secondary Education Act of 1965 (Pub. L. No. 89-10) (hereinafter "Title I"). According to information compiled by the New York City Board of Education for the 1977-1978 school year, 15,109 students attending 97 Catholic elementary and secondary schools in Manhattan, the Bronx and Staten Island were eligible,

on the basis of economic and educational deprivation, to receive Title I services during that school year. Of the eligible Title I students in those schools, 7,781 actually received Title I remedial services.

6. Prior to the commencement of Title I remedial services for nonpublic school students in New York City in 1966, the Catholic elementary and secondary schools in the Archdiocese of New York did not have the financial resources to provide to economically and educationally disadvantaged students any of the types of remedial educational services presently available under Title I. If, for any reason, those Title I remedial educational services were no longer available to qualified students in the Catholic elementary and secondary schools in the Archdiocese of New York, the schools themselves would not have the economic resources to provide the services on their own.

7. I have reviewed several decisions of the United States Supreme Court deciding the constitutionality of public aid programs benefiting church-related elementary and secondary schools and the descriptions of those schools contained in those opinions. In particular, I have examined the decisions in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), and *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973), which invalidated programs of aid to church-related schools and their students enacted by the New York Legislature. Each of those decisions contained what the Court identified as a "profile" of church-related elementary and secondary schools in New York State. Based on my review of those decisions and my knowledge of the Catholic elementary and secondary schools in the Archdiocese of New York, I can state that the "profile" of the church-related elementary and secondary schools recited in those opinions does not accurately describe the Catholic elementary and secondary schools under my supervision which have Title I programs under the auspices of the New York City Board of Education.

General Observations

8. Before addressing the specific elements of the "profile" contained in the *Nyquist* and *Levitt* decisions, a few general observations about the Catholic elementary and secondary schools under my supervision are appropriate. The focus of the general and specific observations which follow is on those Catholic elementary and secondary schools which have Title I programs. Because those schools are located in the inner city and have significant non-Catholic student populations, they have characteristics that defy stereotyping.

9. The underlying objective of the Catholic elementary and secondary schools under my supervision is to provide a sound education to their students so that those students can become responsible, productive and moral citizens. While the public schools have a comparable central objective, our schools are distinctive from the public schools in that we add to an otherwise complete education instruction in religion, and that we consciously and explicitly address questions of morals and values when those questions are relevant to the subject matter being taught.

10. A concern for religion and religious values has always been central to the Catholic philosophy of education. However, Catholic educators are aware that such a concern is not theirs exclusively. Much of what is taught to students in the elementary and secondary grades, wherever they attend school, is value-laden, and no conscientious teacher can ignore the value implications of what might otherwise be considered a secular subject matter. For example, any treatment in a social science class of the civil rights movement of the past 20 years involves the teacher in forming a value judgment on the dignity of individual persons. The "religious" values that are addressed in Catholic elementary and secondary schools, and particularly those with a significant non-Catholic student population, are not narrowly parochial or sectarian in nature, but rather more

broadly Christian in recognition of the Judeo-Christian heritage of this nation. Our schools also constantly stress moral, as distinct from precisely religious, values. These include responsibility, tolerance, brotherhood, thoughtfulness and studiousness.

11. The concern for religion and religious values which is central to the philosophy of Catholic schools in no way dilutes or distorts the content of what would be considered secular, as opposed to religious education, courses. Indeed, a document issued in 1977 by the Vatican's Sacred Congregation for Catholic Education admonished Catholic educators as follows:

> "Individual subjects must be taught according to their own particular methods. It would be wrong to consider subjects as mere adjuncts to faith or as a useful means of teaching apologetics. They enable the pupil to assimilate skills, knowledge, intellectual methods and moral and social attitudes, all of which help to develop his personality and lead him to take his place as an active member of the community of man." *The Catholic School*, § 39 (a document issued by the Sacred Congregation for Catholic Education, March 19, 1977).

The Catholic schools under my supervision have consistently adhered to that proposition—namely, that secular subject matter has its own integrity and must be taught without distortion or intrusion of religious concerns not relevant to the subject matter.

12. There are two fundamental reasons why Catholic elementary and secondary schools under my supervision offer a separable secular education, along with the religious instruction that is provided.

> a. We are obligated under the provisions of the New York State Education Law to offer a curriculum which offers at least the following courses: mathematics, reading, writing, English language, geography, U.S. history, civics, health education,

physical education, New York State history, science and safety education. We are also obligated to provide our students in those courses with a body of knowledge comparable to that provided the students in the public schools in the state so that our students can perform satisfactorily on standardized tests provided by state officials to both public and nonpublic school students.

b. Even in the absence of those obligations imposed by state law, however, our schools would still provide a curriculum of the type described above. The obligations of our schools extend far beyond the religious needs of our students—they extend to their temporal requirements. We would be failing in our obligations as educators and would have no right to sponsor schools if we did not provide our students with that education which is necessary for them to be responsible and productive citizens.

That Catholic schools teach secular subjects both objectively well is attested by the readiness of public and private high schools, colleges and universities to admit graduates of those schools.

13. Against this background of the general educational philosophy of the Catholic elementary and secondary schools under my supervision, it is appropriate to address the specific characteristics of the "profile" of those schools which the Supreme Court used to decide the *Nyquist* and *Levitt* cases.

Religious Mission

14. One of those characteristics is that the schools that the Court was examining were "an integral part of the religious mission of the church sponsoring it." While the words quoted are, standing alone, unobjectionable as a description of the motivation of many persons who sponsor our schools, they are misleading in the inferences that the Supreme Court drew from them as a character-

istic of the educational process of Catholic elementary and secondary schools. They are especially misleading for the Catholic schools that have Title I programs provided by the New York City Board of Education.

15. It cannot be denied that any enterprise undertaken by the Roman Catholic Church is religiously motivated. Thus, the operation of elementary and secondary schools by parishes and a diocese is consistent with that generosity which is central to the mission of the Roman Catholic Church and mandated by its Founder. But so is the care of the hungry or the ill-housed, and motivation in no way clouds or dilutes such assistance. The difficulty lies in defining the precise nature of that religious mission relative to educating children in need of remedial instruction.

16. In this regard, a central fact about Catholic elementary and secondary schools is that they are community-based—that is, the overwhelming number of those schools are sponsored by a parish which is located in a particular community and which draws its students from that community. Those schools of necessity, therefore, reflect the ethnic, cultural, economic and religious profile of their communities. These factors can, do and should affect the educational philosophy and practice of each school. And, while general policies and goals are set forth at the diocesan level covering such diverse matters as health and safety regulations and curriculum content, how those policies and goals will be implemented by each school depends on the needs and the skills of its population. Indeed, in many of the schools in the Archdiocese, those policies and goals are implemented by parish school boards that are composed of the parents of students, who in Title I schools include a number of non-Catholics.

17. The eligibility requirements for student participation in Title I remedial programs are such that those programs will be found only in those Catholic elementary and secondary schools that are in that portion of the metropolitan area which we have come to call the "inner

city." That fact, which is essential to understanding the work of Title I Catholic elementary and secondary schools, necessarily defines the educational mission of the schools which is in no way compromised by the religious motivation that is the foundation of the desire to serve the ill-educated, as much as it is to serve the ill-fed.

18. Because they are located in inner-city communities, the Title I schools in Manhattan, the Bronx and Staten Island draw their students from highly concentrated minority populations. When those schools are located in certain areas in the inner city, the population from which the students are drawn is overwhelmingly Black and contains a large number of non-Catholics. The majority of the students attending several Catholic elementary schools in areas with large Black populations are not of the Roman Catholic faith.

19. Moreover, while the responsibility for financing the operation of elementary schools rests with the parish or parishes sponsoring those schools, the Archdiocese has found it necessary over the past seven years to provide a subsidy to inner-city schools with significant non-Catholic student bodies to keep them in operation. The Archdiocesan Commission for Inter-Parish Financing has distributed approximately $2.5 million each year, principally to parishes which operate schools with Title I programs. Ninety percent of the money has been used to defray deficits incurred by the Title I schools. In the 41 elementary schools receiving funds from the Commission for Inter-Parish Financing, there are 16,245 students, of which 2,623, or approximately 16 percent, are non-Catholic. In addition, the Archdiocese has an Inner City Scholarship Fund which has awarded scholarships exclusively to students at 56 inner-city schools with Title I programs in Manhattan and the Bronx. During the 1978-1979 academic year, some $300,000 was provided by that Fund for tuition subsidies for students in those Title I schools.

20. In light of the fact that there are substantial diocesan subsidies to inner-city Title I schools with significant non-Catholic student bodies, a question arises as to what "religious" mission the Archdiocese is fulfilling in maintaining such schools. The answer is clear to those who understand the deep concern that the Catholic Church, in general, and Catholic educators, specifically, have for those people who are victims of economic deprivation, whether they are Catholic or not. The mission is one of social and community action, which is reflected in the willingness of the Catholic Church to divert its resources from strictly religious activities to aid those who are the victims of social, economic and cultural disadvantage or racial discrimination. A long-standing mission of the Roman Catholic Church has been to alleviate the effects of social injustice, and that mission is fulfilled in part by the continued operation of inner-city Title I schools for the benefit of the community, irrespective of whether those schools serve a predominantly Catholic population.

Obedience to Doctrines and Dogmas

21. Another of the characteristics of the "profile" of Catholic elementary and secondary schools contained in the *Nyquist* and *Levitt* decisions is that they "require obedience by students to the doctrines and dogmas" of the Catholic faith. I can state unequivocally that no Catholic school under my supervision has any such purpose or serves any such function.

22. While the religious education provided by Catholic elementary and secondary schools reflects a concern that students receive, in their normal educational setting, an exposure to the teachings of the Roman Catholic Church and Christianity in general, it is not the function of a school to compel its students to believe anything, religious or otherwise. The purpose of a school is strictly to provide its students with the information and means

of analysis so that they can come to a better understanding of the subject matter, whether that subject matter is religious or secular in nature. Our schools would be untrue to their functions as educational institutions if they sought to compel students to accept one religious viewpoint or another, just as they would be shirking their responsibility if they compelled the students to accept one interpretation of Shakespeare rather than another or one explanation for the American Civil War rather than another.

23. Our schools would not only diminish their standing as quality educational institutions if they sought to compel obedience of students to the doctrines and dogmas of the Roman Catholic Church. They would also be acting contrary to the very doctrines of that Church. A central principle of Roman Catholic theology is that religious faith must be freely given and freely accepted. Under that precept, nothing may be done by the Church, or anyone acting on its behalf, that would seek to coerce the conscience. Thus, those responsible for the operation of Catholic elementary and secondary schools would be untrue to their own beliefs if they sought to compel the students to obey the doctrines and dogmas of the Church.

Inculcation of Religious Values

24. A third characteristic of the "profile" schools in the *Nyquist* and *Levitt* decisions was that they had "as a substantial purpose the inculcation of religious values." That characteristic is neither a purpose nor a function of the Catholic elementary and secondary schools under my supervision.

25. The word "inculcate" has connotations which are inconsistent with the educational process. It suggests both in its connotations and literal definition an effort to induce students to accept ideas or values through coercion. Our schools do not engage in that activity, whether religious values or other aspects of learning are involved.

26. By denying that our schools "inculcate" religious values, I do not mean to suggest that exposure of students to religious values is in any way foreign to our schools or our educational program. Our schools have as a central concern that students be aware of Catholic values and examine those values critically. That concern is expressed not only in our religious education classes, but also in our practice of examining the relationship of religious or moral values to the entire learning process where such values are relevant to the subject matter. But we do not seek to force our students to adopt religious values that they cannot or do not freely accept.

Admission Requirements

27. A further characteristic of the "profile" schools in the *Nyquist* and *Levitt* decisions is that they "impose religious restrictions on admissions." The Title I Catholic elementary and secondary schools under my supervision do not operate under any such restrictive admissions policy.

28. Because most of the schools under my supervision are supported by the revenues of the parishes which sponsor them, preference in admissions is given to children of those persons who provide revenue to the parish —namely, parishioners who contribute regularly to the parish. Because of that policy, first preference for available places in the schools under my supervision would be given to the children of those Catholic parents.

29. However, once the needs of the children of parishioners are met, remaining spaces at the school are open without consideration to the religious affiliation of the student or of his parents. Indeed, the prevailing policy is to give preference, after the needs of children of parishioners are met, to others living within or close to the geographical boundaries of the parish. By definition, the second level of preference is for students who are not of the Catholic faith.

30. That these policies do not restrict admissions on religious grounds is most dramatically illustrated by the Title I Catholic elementary and secondary schools under my supervision. Of the approximately 34,000 students enrolled in the 79 Catholic elementary and secondary schools in Manhattan, the Bronx and Staten Island which have Title programs on their premises, approximately 14.7 percent are of a religious faith other than Catholic. The percentage of non-Catholic students in the Title I schools is even higher in those areas with predominantly Black and Asiatic populations. For example, several Title I schools serving those communities have student populations that are more than 60 percent non-Catholic.

31. The predominance of Catholic students in the enrollment statistics is a natural consequence of our desire to see that children of those who support the parish, which supports the school, should in equity have free access to those schools. However, those schools remain community-based and welcome all members of the community to the school when the needs of parishioners have been satisfied. Whenever the community in which the school is located has a significant non-Catholic population, the consequence of our admissions policy is to invite significant numbers of non-Catholics to be educated in our schools.

Faculty Hiring Policies

32. Another aspect of the "profile" schools described in the *Nyquist* and *Levitt* decisions is that they impose "religious restrictions on faculty appointments." To my knowledge, teaching positions in the Catholic elementary and secondary schools under my supervision are not restricted to Roman Catholics. Hiring is a responsibility of the individual schools; the Archdiocesan office serves simply as a clearinghouse for applicants who are seeking teaching positions in the Catholic elementary and secondary schools. The Archdiocesan school office retains a file of applications, and the names of qualified applicants

are made available to individual schools as teaching positions become available.

33. The teacher application form currently used by the Archdiocese requests information concerning the religious affiliation of the applicant. No application is rejected and no applicant is denied referral to a school because he or she is of a religious faith other than Roman Catholic.

34. Individual schools have broad latitude in deciding whether or not to hire an applicant referred to them by the Archdiocesan school office. Under Archdiocesan policies, no applicant is referred who does not have sound academic qualifications, a matter of primary consideration. As a matter of Archdiocesan policy and practice by individual schools, no person will be hired for a teaching position if he or she is openly hostile to the Roman Catholic Church or its belief system. Barring such aggravated sentiments, non-Catholic applicants experience no discrimination in the hiring process. In the employment interview, all applicants are made aware of and asked if their consciences would allow them to cooperate with the policies of the school, the religious education program, value education and the general Catholic atmosphere of respect for each other, for learning and for God.

35. I am aware that there are teachers employed by Catholic elementary and secondary schools under my supervision who are not Roman Catholics. This is particularly true in schools with significant numbers of Black students, where role models are important and where there are very few Black Catholics with the requisite academic qualifications to draw from. The precise number of non-Catholics teaching in Archdiocesan schools is difficult to determine because the school census cards received by my office do not classify teachers by religious affiliation. However, an inquiry of a random sample of Title I schools revealed that 15 non-Catholics were teaching in the schools contacted, and I am aware that is not the total number of non-Catholic teachers in our system.

For example, I know that 20 of a total of 359 lay teachers employed by Archdiocesan high schools are not Catholic. Unlike parish elementary schools, the direct administration of those high schools is a function of the Archdiocesan office. These statistics amply demonstrate that the schools of the Archdiocese do not restrict the hiring of teachers on religious grounds.

Religious Restrictions on Course Content

36. Another feature of the "profile" schools in the *Nyquist* and *Levitt* decisions is that they "impose religious restrictions on what or how the faculty may teach." That characteristic does not accurately describe the Catholic elementary and secondary schools under my supervision.

37. The emphasis in the religious education classes in the overwhelming majority of the schools under my supervision is on the teachings of Christianity as the Roman Catholic Church formulates them. Those responsible for teaching the religious education classes must have a thorough understanding of the teachings of the Roman Catholic Church and are required to teach them accurately, not presenting anything as Catholic doctrine which is not factually so. This restriction, however, does permit and indeed encourages those responsible for religious education to explain the positions taken by other Christian denominations or other religious faiths on particular issues that are within the purview of the religious education curriculum.

38. There are no religious restrictions on the secular content of the secular subjects offered in the Catholic elementary and secondary schools under my supervision. The secular content of those secular courses has its own academic integrity, and it would be a gross distortion of the educational process to restrict the secular content of those courses because of the religious beliefs of the Roman Catholic Church.

39. It is true, of course, that in the educational process there is not always a sharp line dividing the secular

from the religious. In history, for example, a large part of the story of the development of Western civilization is the story of the impact of Christianity on Western civilization. Of necessity, the course in Western Civilization will touch upon the conflicts that divided the Christian Church into various denominations and sects. If the historian's objective account of the precise points of conflicting theological dogma is inconsistent with the Roman Catholic theologian's account, the reconciliation, if there is to be one, should be made by the theologian and not the teacher of history. However, the teacher who must include an historical account of the Reformation in a class in one of the schools under my supervision would be expected to give the account that is most consistent with the best available historical materials and not necessarily the account that is consistent with a Roman Catholic theologian's view of the Reformation.

40. Some of the secular subjects taught in the schools under my supervision also touch questions of morals and values. Teachers are not restricted on how they approach such subject matter, but are encouraged to expose students to the moral and value dimension of the subject matter within a Christian framework and not to shun those issues.

Attendance at Religious Instruction

41. An additional feature of the "profile" schools in the *Nyquist* and *Levitt* decisions is that they "require pupils to attend instruction in the theology or doctrine of a particular faith." It is true that all students enrolled in the schools of the Archdiocese take a course in religion as a part of the curriculum. However, to the extent that this characteristic of the "profile" implies that the content of the religious instruction offered is narrowly sectarian in content or is taught to compel adherence by students to particular religious beliefs, it does not accurately portray the schools under my supervision.

42. As previously explained in this affidavit, courses in religious education are a regular part of the curriculum of the schools under my supervision and the emphasis in those courses is on the teachings of Christianity as the Roman Catholic Church formulates them. Parents of children who are not members of the Roman Catholic faith are informed of these features of the curriculum prior to enrollment.

43. The religious instruction offered in the schools under my supervision is not limited to the specific doctrines and dogmas of the Roman Catholic Church, although religious teachings and beliefs that are peculiar to the Roman Catholic Church are explained to the students. However, the Roman Catholic Church is part of a much broader Christian community, and the religious instruction in the Archdiocesan schools includes much of what the Roman Catholic Church shares with other Christian denominations. In addition, religious teachings of other denominations that conflict with Roman Catholic teachings are explained to students so that they will have a better understanding of the nature of religious belief.

44. Moreover, a central goal of the religious instruction program is to show students the importance and value of services to others. Thus, as an extension of the religious instruction program, students are encouraged to participate in tutoring younger students, visiting elderly persons who are shut-in or hospitalized, and activities such as Red Cross Walk-a-Thons and the Cerebral Palsy reading program.

45. No effort is made in the religious education courses offered by the schools under my supervision to compel any student, whether Catholic or of some other religious faith, to accept as valid or to adhere to the beliefs of the Roman Catholic Church. Those beliefs are explained and explored in the religious education classes in the same manner that other subject matter taught in those schools is explained and explored, and students are

free to accept or reject those beliefs according to their own consciences.

46. Parents of children who subscribe to a religious faith other than the Roman Catholic faith enroll their children in the schools under my supervision for a variety of reasons. One of their motivations is that they themselves are strongly religious people—whether they be Baptists or Muslims or Buddhists—and they wish their children to be exposed to religious values. They enroll their children in Catholic elementary and secondary schools at considerable expense to themselves, and their primary objective is to obtain a sound education for their children and not because they want their children exposed to any proselytizing efforts by the schools. In confirmation of this fact, to my knowledge there has never been an instance of a non-Catholic student removed from a Catholic elementary or secondary school because the student was forced to believe or engage in a religious practice in violation of that student's own conscience or belief system.

Attendance at Religious Activities

47. A final characteristic of the "profile" schools in the *Nyquist* and *Levitt* decisions is that they "require attendance of pupils at religious activities." The Catholic elementary and secondary schools under my supervision engage in that practice. However, non-Catholic students are not permitted to participate in some religious activities, such as reception of the Sacraments.

48. Most of the Catholic elementary and secondary schools under my supervision have some form of religious observance as part of the school day. Most typically, that religious observance will be in the form of a prayer recited at the beginning or the end of the school day, or before instruction begins in a particular class. In addition, during regular school hours on an occasional basis most schools will schedule more formal liturgical observances, such as attendance at Mass by a class or the

entire school. All students enrolled in the schools are expected to be present for such religious observances, but the degree or extent to which they participate in those observances is a matter of conscience for the individual student, and that freedom of conscience is scrupulously observed by teachers.

49. The parents of students who subscribe to a religious faith other than the Roman Catholic faith are told prior to registration that their children will be expected to be present for the types of religious observances that I have described. To my knowledge, no parent of a student who is of a religious faith other than the Roman Catholic faith has complained that the student's participation in those religious observances has in any way compromised the student's own religious beliefs or practices.

Conclusion

50. I have attempted in this affidavit to describe accurately the policies and practices of the Catholic elementary and secondary schools under my supervision as they relate to the various characteristics of the "profile" schools that the Supreme Court described in the *Nyquist* and *Levitt* decisions. As the information I have supplied should make clear, the schools under my supervision depart significantly from the schools of the "profile." That is particularly true of those schools which have Title I programs under the auspices of the New York City Board of Education—schools which have a significant number of non-Catholic students.

51. By distinguishing those schools from the characteristics of the "profile" schools, I do not intend to deny that those schools serve religious functions or have religious objectives. However, where the "profile" attempts to portray such schools as having a singular and overriding objective of indoctrinating students in the Roman Catholic faith or compelling them to subscribe to the beliefs of the Roman Catholic Church, the "profile" distorts

and misstates the total educational mission of those schools.

52. The basic objective of the Catholic elementary and secondary schools under my supervision, including those with Title I programs, is to provide their students with a sound education in an environment in which the students are exposed to religious education and religious values. Our goal is to produce students who have the knowledge and intellectual skills to be responsible and productive members of their communities and who are also aware of the religious heritage of our society.

/s/ John J. Healy
REVEREND MONSIGNOR JOHN J. HEALY

Subscribed and sworn to before me
this 22 day of March, 1979.

/s/ Josephine Raymond
JOSEPHINE RAYMOND

Notary Public, State of New York
No. 31-8505425
Qualified in New York County
Commission Expires March 30, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 888 (CHT)

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, Secretary of the United States Department of Health, Education and Welfare, ET AL., DEFENDANTS

and

JAMES and BESSIE BOVIS, ET AL., INTERVENOR-DEFENDANTS

and

PHILIP and IDA FENSTER, ET AL., INTERVENOR-DEFENDANTS

AFFIDAVIT OF REVEREND VINCENT D. BREEN

STATE OF NEW YORK)
) ss:
COUNTY OF KINGS)

REVEREND VINCENT D. BREEN, being duly sworn, deposes and says:

1. I am the Superintendent of Education of the Roman Catholic Diocese of Brooklyn. My administrative responsibilities include overall supervision of the education of approximately 125,000 students in the elementary and secondary parochial schools in the Counties of Queens and Kings.

2. I make this affidavit on behalf of the several defendants in this matter, with the understanding that it will be submitted to the Court as part of the joint exhibits to be filed by the several defendants.

3. I have been Superintendent of Education for the Diocese of Brooklyn since June 1978. For two years prior to my appointment as Superintendent of Education, my title was Superintendent of Schools for the Diocese. Prior to that time, I served as Associate Superintendent of Schools from September 1, 1973, to June 30, 1976, and as Assistant Superintendent of Schools from October 1, 1966, to August 31, 1973.

4. In my position as Superintendent of Education for the Diocese of Brooklyn, I have become familiar with the operation of the Catholic elementary and secondary schools within the Diocese. There are 178 Catholic elementary schools and 24 Catholic secondary schools in the two counties that constitute the Diocese. The public schools in those two counties are under the jurisdiction of the New York City Board of Education.

5. In my position as Superintendent of Education for the Diocese of Brooklyn, I have become familiar with the program of remedial education made available through the New York City Board of Education to economically and educationally disadvantaged children who attend nonpublic schools in Kings and Queens Counties under Title I of the Elementary and Secondary Education Act of 1965 (Pub. L. No. 89-10) (hereinafter "Title I"). According to information supplied by the New York Board of Education, 12,913 students in 79 Catholic elementary and secondary schools in Kings and Queens Counties were eligible during the 1977-1978 school year, on the basis of economic and educational deprivation, to receive Title I services. Of the total eligible students, 7,726 actually received Title I remedial educational services during that school year.

6. Prior to the commencement of Title I remedial services for nonpublic school students in New York City in 1966, the the Catholic elementary and secondary schools in the Diocese of Brooklyn did not have the financial resources to provide to economically and educationally disadvantaged students any of the types of remedial educational services presently available under Title I. If, for

any reason, those Title I remedial educational services were no longer available to qualified students in the Catholic elementary and secondary schools in the Diocese of Brooklyn, the schools themselves would not have the economic resources to provide the services on their own.

7. I have reviewed several decisions of the United States Supreme Court deciding the constitutionality of public aid programs benefiting church-related elementary and secondary schools and the descriptions of those schools contained in those opinions. In particular, I have examined the decisions in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), and *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973), which invalidated programs of aid to church-related schools and their students enacted by the New York Legislature. Each of those decisions contained what the Court identified as a "profile" of church-related elementary and secondary schools in New York State. Based on my review of those decisions and my knowledge of the Catholic elementary and secondary schools in the Diocese of Brooklyn, I can state that the "profile" of the church-related elementary and secondary schools recited in those opinions does not accurately describe the Catholic elementary and secondary schools under my supervision which have Title I programs under the auspices of the New York City Board of Education.

General Observations

8. The Catholic elementary and secondary schools under my jurisdiction seek to provide, above all, a sound education to their students so that those students can become useful, productive and concerned citizens. While the public schools have a comparable central objective, our schools are distinctive from the public schools in that we insist that instruction in religion be a part of the regular school day and that we consciously and explicitly address questions of morals and values when those questions are relevant to the subject matter being taught.

9. A concern for religion and religious values has always been central to the Catholic philosophy of education. However, Catholic educators recognize that such a concern is not their exclusive province. Much of what is taught to students in the elementary and secondary grades, wherever they attend school, is value-laden, and no conscientious teacher should ignore the value implications of secular subject matter. So, in social studies programs in the public schools in New York City the question of the horrors of the Holocaust is considered and involves both teachers and students in coming to a value judgment about the Nazi treatment of the Jews during World War II. When the question of slavery is taught in history classes concerned with the Civil War, students must also examine similar value questions about the treatment of Blacks in their own country. While religious instruction is given in all Catholic elementary and secondary schools which emphasizes the teachings of Roman Catholicism, the religious and moral values that are addressed in other subjects, particularly in those schools with a significant non-Catholic student population, are not simply Catholic but include more broadly Christian values in recognition of the Judeo-Christian heritage of this nation.

10. The concern for religion and religious values which is central to the philosophy of Catholic schools does not, however, dilute or distort the content of what would be considered secular, as opposed to religious, education courses. Indeed, a document issued in 1977 by the Vatican's Sacred Congregation for Catholic Education admonished Catholic educators as follows:

> "Individual subjects must be taught according to their own particular methods. It would be wrong to consider subjects as mere adjuncts to faith or as a useful means of teaching apologetics. They enable the pupil to assimilate skills, knowledge, intellectual methods and moral and social attitudes, all of which

> help to develop his personality and lead him to take his place as an active member of the community of man." *The Catholic School*, § 39 (a document issued by the Sacred Congregation for Catholic Education, March 19, 1977).

The Catholic schools under my supervision have consistently adhered to that proposition—namely, that secular subject matter has its own integrity and must be taught without distortion or intrusion of religious concerns not relevant to the subject matter.

11. There are two fundamental reasons why Catholic elementary and secondary schools under my supervision offer a separable secular education, along with the religious instruction that is provided.

> a. We are obligated under the provisions of the New York State Education Law to offer a curriculum which includes at least the following courses: mathematics, reading, writing, English language, geography, United States history, civics, health education, physical education, New York State history, science and safety education. We are also obligated to provide our students in those courses with a body of knowledge comparable to that provided the students in the public schools in the state so that our students, when they leave school, are prepared to enter into the society with skills and knowledge comparable with other members of society.
>
> b. Even in the absence of those obligations imposed by state law, however, our schools would still provide a curriculum of the type described. We would be failing in our obligation as educators if we did not provide our students with the education necessary for them to be responsible and useful citizens.

12. Against this background of the general educational philosophy of the Catholic elementary and secondary schools under my supervision, it is appropriate to address more specifically the nature of our Catholic

schools, particularly Catholic schools whose students participate in the Title I program.

The Mission of Catholic Schools

13. It cannot be denied that any enterprise undertaken by the Roman Catholic Church is religiously motivated. Thus, the operation of elementary and secondary schools by parishes is consistent with the religious mission of the Roman Catholic Church. However, that religious mission of the Roman Catholic Church is very broad in its scope. Our schools are aware that Jesus told his followers to teach all nations. Our schools have interpreted that command to mean that education—both religious and secular—is important to mankind, and they are seeking to fulfill that need. However, we also know that Jesus told us to "feed the hungry, give drink to the thirsty, clothe the naked." Thus the Roman Catholic Church offers services to those who are afflicted, assists those who are in need and comforts those who are unhappy, whatever their race or creed. The religious mission of the Catholic Church, therefore, includes both educational and social concerns.

14. The essential fact about Catholic elementary and secondary schools is that they are community-based—that is, the overwhelming number of those schools are sponsored by a parish which is located in a particular community with geographical boundaries and which draws its students from the members of the community residing within those geographical boundaries. Those schools of necessity, therefore, reflect the ethnic, cultural, economic and religious profile of the community in which they exist. These factors can and do affect the educational philosophy and practice of each school. And, while general policies and goals are set forth at the Diocesan level, covering such diverse matters as health and safety regulations and curriculum content, how those policies and goals will be implemented by each school depends on the needs and skills of its population. The religious mis-

sion of each Catholic parish is to meet the needs of its parishioners—both educational and social—as they are reflected in the needs and circumstances of the local population.

15. The eligibility requirements for student participation in Title I remedial education programs are such that those programs will be found only in those Catholic elementary and secondary schools that are in that portion of the metropolitan area which we have come to call the "inner city." To understand the mission of Catholic elementary and secondary schools whose students receive Title I services, it is essential to define the community that is being served and the mission which those parishes fulfill in operating schools in those communities.

16. Because they are located in inner-city communities, the Title I schools in Kings and Queens draw their students from a highly concentrated minority population. When those schools are located in such areas as Bedford-Stuyvesant, the population from which the students are drawn is overwhelmingly Black. It is a fact that a small minority of the American Black community is Roman Catholic. Consequently, Catholics constitute a minority of the total population of Bedford-Stuyvesant. Nevertheless, Catholic parishes in Bedford-Stuyvesant continue to operate elementary schools and, as a consequence, now serve a student population that is approximately 40 percent non-Catholic.

17. While the responsibility for financing the operation of elementary schools rests with the parish or parishes sponsoring those schools, the Diocese of Brooklyn has found it necessary over the past 13 years to provide an additional Diocesan subsidy to inner-city schools with significant non-Catholic student bodies to keep them in operation. This subsidy is necessary because the parishes do not have sufficient funds to provide a full subsidy for the operation of their schools. Over the past 13 years, the Diocese of Brooklyn has contributed, in addition to the subsidies of each individual parish, a

Diocesan subsidy amounting to almost $11 million. Virtually all of the money has been used to defray deficits incurred by schools with Title I programs. In Bedford-Stuyvesant alone, where a significant number of non-Catholic youngsters are attending our schools, the Diocesan contribution to the operation of those schools has been over $2 million.

18. It is evident that the religious mission which both parishes and the Diocese are fulfilling in the operation of these schools and for which the Diocese and parishes are expending such large sums of money relates to the educational, as well as the social, mission of the Catholic Church. Those parishes, with the support of the Diocese, have chosen to offer to the students of the inner city a value-laden educational program of high quality. The services are offered despite the fact that the number of Catholic students is not sufficient to fill these schools. Thus, the religious mission of the parishes in sponsoring those schools is a reflection of the educational and social needs of those communities and the educational and social concerns of the Roman Catholic Church.

19. One of the characteristics of the "profile" of the parochial schools discussed by the Supreme Court in its decisions in *Committee for Public Education* v. *Nyquist*, *supra*, and *Levitt* v. *Committee for Public Education*, *supra*, is that those schools were "an integral part of the religious mission of the church sponsoring" them. If that element of the "profile" was intended to address the motivation of the Diocese of Brooklyn in maintaining schools with Title I programs that serve a significant non-Catholic student population, I have no quarrel with applying that description to the schools under my supervision with Title I programs. However, if that element of the "profile" is meant to suggest that those schools exist solely for narrow parochial or sectarian purposes, I would take issue with such a characterization of the schools under my supervision which have Title I programs on their premises. As I have just explained, the

mission of the parishes sponsoring community-oriented schools with Title I programs is as much educational and social as it is religious.

Admissions Practices

20. Since meeting the needs of the communities in which they are located is an important element in the operation of our Catholic inner-city elementary schools and secondary schools, the admissions policies for these schools reflects that factor.

21. Because all of the schools under my supervision are supported, at least in part, by revenues of the parishes which sponsor them, preference in admission is given to children of those persons who provide the revenue to the parish—namely, parishoners who contribute regularly to the parish. Because of that policy, first preference for available places in the schools under my supervision would be given to the children or parishoners.

22. However, once the needs of children of parishoners are met, remaining spaces at the school are open without consideration to the religious affiliation of the student or of his parents. Thus, the remaining seats are available to members of the community and reflect, therefore, the ethnic, cultural, economic and religious profile of that community.

23. The information regularly supplied to my office by individual schools does not show the religious composition of their student bodies. However, a special survey conducted at the request of counsel and completed in June 1976 collected such data for the 75 elementary and secondary schools in the Brooklyn Diocese that had Title I programs on their premises. I have no reason to believe that the figures revealed by the survey have changed significantly since the survey was conducted. The survey showed that the 75 schools had a total student population of 39,194. Of that enrollment, 2,889 students, or 7.4 percent of the total, were non-Catholic. The four schools of the Brooklyn Diocese with Title I

programs that are located in Bedford-Stuyvesant and East New York, where there are large Black populations, had non-Catholic student enrollments of 41, 43, 48 and 58 percent, respectively. The enrollment in those schools, therefore, reflects to a significant degree the racial and religious composition of communities in which they are located. Similarly, one-third of the total enrollment in the four schools of the Brooklyn Diocese in South Jamaica and Springfield Gardens is non-Catholic. Again, those communities have a large Black population, and the number of non-Catholics in the four schools reflects the composition of those communities.

24. The preference for Catholic students in the admissions process is a natural consequence of our desire to see that children of those who support the parish which supports the school should have free access to these schools. However, those schools are strongly community-oriented and admit students from all segments of the community after the needs of parishoners have been satisfied. Whenever the community in which the school is located has a significant non-Catholic population, as in the case with many of the schools of the Brooklyn Diocese with Title I programs on their premises, the consequence of the admissions policies of those schools is to admit significant numbers of non-Catholics to be educated in those schools.

25. Another element of the "profile" of the parochial schools described in the *Nyquist* and *Levitt* decisions was that those schools "impose religious restrictions on admissions." As is evident from the statistics that I have referred to, the schools in the Brooklyn Diocese with Title I programs on their premises generally do not, as a matter of policy and practice, restrict admissions on religious grounds.

Curriculum

26. The curriculum offered in the elementary and secondary schools of the Brooklyn Diocese contains all of

the secular courses prescribed by New York State law and also includes courses in religious instruction. In all courses offered in those schools, questions of religious and moral values are examined when they are relevant to the subject matter being taught. It is the inclusion of religious instruction as part of the regular curriculum and the value-oriented nature of that curriculum which, in my opinion, makes Catholic schools distinctive.

27. There are no religious restrictions on the secular content of the secular subjects offered in the elementary and secondary schools of the Brooklyn Diocese. Those responsible for the education offered in those secular courses are committed to the search for truth, and are not restricted in that search by any religious restraints. The secular content of the secular courses has its own academic integrity, and it would be a gross distortion of the educational process of our schools to restrict the secular content of those courses because of the religious beliefs of the Roman Catholic Church. Thus, our schools do not "impose religious restrictions on what or how the faculty may teach," as the Supreme Court assumed the parochial schools described in the "profile" in the *Nyquist* and *Levitt* decisions did.

28. It is true, of course, that there is not always a sharp line dividing the secular from the religious in the educational process. In the study of history, for example, a large part of the story of the development of Western civilization is the story of the impact of Christianity on that civilization. Of necessity, therefore, the course in Western Civilization will touch upon the history of Christianity and upon the conflicts that have divided Christianity into various denominations and sects. The history teacher's objective and role in our schools is to present an objective account from the point of view of the discipline of history of those conflicts. If that objective account of the conflicts is inconsistent with an account offered by Roman Catholic theologians, any reconciliation of those inconsistencies, if there is to be a rec-

onciliation, should be made by the theologian and not the history teacher, for it is the theologian who is most academically qualified to explain the points of difference on questions of faith and morals among the various Christian denominations.

29. Some of the secular subjects taught in the elementary and secondary schools in the Brooklyn Diocese, of necessity, touch upon questions of morals and values. While teachers are not restricted on how they treat those matters of morals and values, they are encouraged to address directly such matters and not shun them.

30. The teachers in the elementary and secondary schools of the Brooklyn Diocese do not engage in any effort to inculate students in specific religious or moral values. The concept of "inculcation" is simply inconsistent with the educational process. That concept suggests, both in its connotations and literal definition, an effort to induce students to accept ideas or values through coercion. The schools under my supervision do not engage in that activity, whether religious values or other aspects of learning are involved. Thus, the schools under my supervision do not have "as a substantial purpose the inculcation of religious values," a characteristic attributed to the parochial schools in the *Nyquist* and *Levitt* decisions when the Supreme Court described the "profile" of those schools.

31. While our schools do not seek to "inculcate" religious values, they do make a conscious effort to make students aware of such values so that they will be better citizens. Many of the values that are addressed are expressed in the teachings of the Roman Catholic Church. However, many of those values—such as justice, respect for the dignity of other persons and racial tolerance—are also shared by other religious denominations and our society in general. The purpose of examining those values in all aspects of the curriculum where they are relevant is to bring students to an understanding of those values and, if they freely choose, a commitment

to those values. Such an objective in no way differs from the efforts of the public schools to bring their students to a free commitment to such values as patriotism, honesty and truth in their dealings with others. The study of the horrors of the Holocaust in the social studies program of the New York City public schools is specifically intended to show students that religious and racial intolerance is an evil to be abhorred. It is also intended to encourage the students to commit themselves to the values of tolerance, justice and concern for others in society. The explicit value orientation of the curricula in the schools of the Brooklyn Diocese has a similar objective.

32. I should also note that the values that are addressed in the curricula of the schools of the Brooklyn Diocese are not exclusively or narrowly religious in nature. For example because those schools, including the schools with Title I programs, reflect the needs and aspirations of the communities in which they are located, the elementary and secondary schools of the Brooklyn Diocese which are located in communities with large ethnic populations will orient their curricula to take account of the ethnic concerns of the communities. Thus, a Diocesan school located in a predominantly Black community gives special attention to topics such as Black studies and Black history. Dealing with those ethnic concerns is as much a statement of values as including courses in religious instruction in the curriculum.

33. As I have previously mentioned, religious education is a regular part of the curriculum in the schools under my supervision. Parents who enroll their children in those schools, whether those parents are Catholics or members of some other religious faith, are told prior to enrollment that their children must participate in the entire curriculum of the schools, including that portion of the school day devoted to religious instruction.

34. In the *Nyquist* and *Levitt* decisions, the Supreme Court included as one element of the "profile" of parochial

schools that they required students to "attend instruction in the theology and doctrine of a particular faith." While all students in the schools under my supervision are required to attend religious instruction, the content of that instruction is not as narrow or as limited as the Supreme Court suggested in those two decisions.

35. The focus of religious instruction offered in the schools of Brooklyn Diocese is on the teachings of Christianity as the Roman Catholic Church understands those teachings. In the course of that instruction, teachings and beliefs that are peculiar to the Roman Catholic Church are examined and explained. Those who teach religious education classes are required to have a thorough understanding of those teachings and beliefs and are required to teach them accurately, not representing as Catholic doctrine something which is not.

36. However, the religious instruction offered in the schools of the Brooklyn Diocese is not limited or restricted to Catholic teaching or doctrine. The Roman Catholic Church is part of a broader Christian community, and many of its teachings and beliefs are shared by other religious denominations. Of necessity, therefore, much of what is taught in religious instruction is not narrowly sectarian in content. Moreover, our schools are conscious of the mandate from the Second Vatican Council to have respect for other Christian communities and to "joyfully acknowledge and esteem the truly Christian endowments from our common heritage" with other Christian churches. In the spirit of that mandate, the religious instruction offered in the schools in the Brooklyn Diocese, and particularly those schools with Title I programs and non-Catholics in the student body, shows respect and sensitivity for the religious beliefs of all students, whatever those beliefs may be.

37. No effort is made in the religious instruction offered by the schools of the Brooklyn Diocese to compel any student, whether he is Catholic or of some other religious faith, to accept as valid or adhere to the teachings

of the Roman Catholic Church. Indeed, any effort to do so would be in direct conflict with Roman Catholic teachings. One of those teachings is that faith is considered to be a gift of God to which each person must respond freely or not at all. It would be contrary to those teachings to attempt to compel any student to adhere to particular religious beliefs or to accept a faith to which he cannot freely subscribe. Thus, the schools under my supervision do not "require obedience by students to the doctrines and dogmas" of the Roman Catholic Church, as the Supreme Court suggested the parochial schools did in the *Nyquist* and *Levitt* cases.

38. Parents of children who subscribe to a religious faith other than the Roman Catholic faith enroll their children in the schools of the Brooklyn Diocese for a variety of reasons. One of their motivations is that they themselves are strongly religious people—whether they be Baptists or Muslims or Buddhists—and they wish their children to be exposed to religious values as a part of their education. But they enroll their children in Catholic elementary and secondary schools at considerable expense to themselves, and their primary objective is to obtain a sound education for their children. The schools of the Brooklyn Diocese would be defeating the expectations of those parents if they used the religious instruction or any other parts of the curriculum for purposes of proselytization or to compel the students to accept beliefs that they cannot in good conscience accept. Those schools would also be contradicting the ecumenical teachings of the Second Vatican Council and denigrating the social mission of the Roman Catholic Church in maintaining the schools in the inner city that are attended by a significant number of non-Catholics.

Religious Activities

39. Most of the elementary and secondary schools of the Brooklyn Diocese include some form of religious ob-

servance as part of the school day. More typically, that religious observance would be in the form of a prayer recited at the beginning or end of the school day, or before instruction begins in a particular class. In addition, many schools will schedule on an occasional basis and during regular school hours more formal liturgical observances. All students enrolled in those schools are expected to be present during those religious observances, but the degree or extent to which they participate is a matter of their own consciences. There are, however, some religious activities in the schools, such as the reception of the Sacraments, in which non-Catholic students are not permitted to participate.

40. One of the characteristics of the parochial schools described in the *Nyquist* and *Levitt* decisions was that they required "attendance of pupils at religious activities." The schools in the Brooklyn Diocese engage in that activity to the extent that I have described.

41. Parents of students who subscribe to a religious faith other than the Roman Catholic faith are told prior to registering their children that the children will be expected to be present for the type of religious observances that I have described. To my knowledge, no parent of a student who is of a religious faith other than the Roman Catholic faith has complained that his child's participation in those religious observances has in any way compromised the student's own religious beliefs or practices.

Conclusion

42. I have attempted in this affidavit to provide an accurate portrayal of the policies and practices of the elementary and secondary schools of the Brooklyn Diocese. I am aware that my description of the policies and practices of those schools is at odds with the description of parochial schools in the *Nyquist* and *Levitt* decisions and with many popular stereotypes of Catholic parochial

schools. However, those stereotypes reflect a profound misconception of the purposes and educational programs of the schools under my supervision.

43. Those stereotypes seek to portray Catholic parochial schools as having a singular and overriding objective of indoctrinating students in the Roman Catholic faith or of compelling them to subscribe to the beliefs of the Roman Catholic Church. While the schools of the Brooklyn Diocese do serve religious functions and do have religious objectives, they do not have the extreme characteristics that the stereotypes attribute to them.

44. The basic objective of the elementary and secondary schools in the Brooklyn Diocese, including those with Title I programs, is to provide their students with a sound education in an environment in which they are exposed to religious education and religious and moral values. Our goal is to produce students who have the knowledge and intellectual skills to be useful and productive members of their communities and who are also aware of the religious dimension of man.

/s/ Vincent D. Breen
REVEREND VINCENT D. BREEN

Subscribed and sworn to before me
this 22nd day of March, 1979.

/s/ Catherine B. Dumphy
CATHERINE B. DUMPHY
Notary Public, State of New York
No. 41-4506593
Qualified in Queens County
Commission Expires March 30, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 CV 1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS, INTERVENOR-DEFENDANTS

MEMORANDUM ORDER

This case presents another chapter in the ongoing saga concerning the constitutionality of provisions of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, *et seq.* *See Flast* v. *Cohen*, 392 U.S. 83 (1968). Plaintiff taxpayers seek declaratory and injunctive relief upon the ground that Title I violates the Establishment Clause of the First Amendment to the United States Constitution. The case is before the Court upon cross-motions for summary judgment.

The case was stayed pending the final outcome of *National Coalition for Public Education and Religious Liberty* v. *Harris* (*PEARL II*), 489 F.Supp. 1248 (S.D. N.Y. 1980) (three-judge court), *appeal dismissed*, 449 U.S. 808 (1980). By stipulation of the parties, this case is to be determined upon the trial and record in *PEARL*

II.[1] Thus, the Court has before it the exact same facts and evidence which persuaded the three-judge District Court in *PEARL II* to find Title I constitutional upon the basis of the record before it.

This Court has considered the thorough and lengthy unanimous decision of Judge Tenney in *PEARL II* and is of the opinion that it reaches the correct result for the reasons stated therein. Plaintiffs rely heavily upon language in *Meek* v. *Pittenger*, 421 U.S. 349, 367-73 (1975); however, they do not respond to Judge Tenney's numerous and accurate observations about the factual distinctions between the two cases. Simply put, the relevant equivalent of the extensive evidence derived from the many years of operation of the Title I program in New York City's schools was not before the courts in *Meek*. As a result, the conclusions reached therein were reasonable inferences drawn from the circumstances.

In the case at bar, however, although arguably some of the circumstances of the Title I program parallel the State program in *Meek*, the direct evidence demonstrates that the concerns of the *Meek* Court about the potential for the unconstitutional mingling of government and religion in the administration of this type of program have not materialized. Undoubtedly, the Supreme Court will not ignore the direct evidence of how Title I has functioned and operated in New York City's nonpublic schools for some seventeen (17) years in favor of plaintiffs' conjecture about the possibility of unconstitutional governmental activity inherent in the arrangements of this program. Therefore, the Court finds that defendants have sustained their burden of demonstrating that Title I, as administered in the nonpublic schools of New York City, does not offend the Establishment Clause of the

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[1] Plaintiffs' memorandum in support of their motion adopts the *PEARL II* court's statement of facts as its own; therefore, there apears to be no dispute about the accuracy of the *PEARL II* court's findings.

First Amendment. Accordingly, defendants' motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied.

SO ORDERED.

The Clerk of Court is directed to enter judgment in favor of defendants dismissing the complaint. The Clerk is further directed to forward copies of this Memorandum Order to counsel for the parties.

/s/ Edward R. Neaher
U.S.D.J.

Dated: Brooklyn, New York
October 4, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 78-1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS, INTERVENOR-DEFENDANTS

JUDGMENT

[Filed Oct. 20, 1983]

A memorandum order of Honorable Edward R. Neaher, United States District Judge, having been filed on October 11, 1983, granting defendants' motion for summary judgment, denying plaintiffs' motion for summary judgment, and directing the Clerk of Court to enter judgment in favor of defendants dismissing the complaint, it is

ORDERED and ADJUDGED that the plaintiffs take nothing of the defendants; that the defendants' motion for summary judgment is granted; that the plaintiffs' motion for summary judgment is denied; and that judgment is entered in favor of defendants dismissing the complaint.

/s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

Dated: Brooklyn, New York
October 17, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 CV 1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS, INTERVENOR-DEFENDANTS

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the plaintiffs in this action hereby appeal to the United States Court of Appeals for the Second Circuit from the memorandum order of the United States District Court for the Eastern District of New York, filed on October 13, 1983, and from the judgment entered on such order by the Clerk of the Court and filed on October 20, 1983 denying plaintiffs' motion for summary judgment, granting defendants' and intervenor-defendants' cross-motion for summary judgment, and dismissing the complaint in the action, and plaintiffs hereby appeal from each and every part of such order and judgment.

Dated: December 1, 1983

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

83-6359

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE and ALLEN H. ZELON, APPELLANTS

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,
and THE CHANCELLOR OF THE BOARD OF EDUCATION OF
THE CITY OF NEW YORK, APPELLEES

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ
and BELINDA WILLIAMS, APPELLANT-INTERVENORS

On Appeal from the United States District Court
for the Eastern District of New York

[Filed August 2, 1984]

NOTICE OF APPEAL

PLEASE TAKE NOTICE that appellee-intervenors Yolanda Aguilar, Lillian Colon, Miriam Martinez and Belinda Williams appeal the Judgment of this Court in this case to the United States Supreme Court pursuant to 28 U.S.C. § 1252.

Appellee-intervenors Yolanda Aguilar, *et al.*, note that the decision of this Court in this case provides that an appeal of its decision to the Supreme Court shall operate

to stay the mandate of this Court until the final disposition of the appeal by the United States Supreme Court. Slip Op. at 5108.

Respectfully submitted,

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Counsel for
Appellee-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that I have, this 2nd day of August, 1984, served a copy of this "Notice of Appeal," by first-class mail, postage prepaid, upon the following:

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/s/ Charles H. Wilson
CHARLES H. WILSON
Counsel for Appellee-Intervenors
Yolanda Aguilar, *et al.*

SUPREME COURT OF THE UNITED STATES

No. 84-237

YOLANDA AGUILAR, ET AL., APPELLANTS

v.

BETTY-LOUISE FELTON, ET AL.

Appeal from the United States Court of Appeals
for the Second Circuit

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. This case is consolidated with case No. 84-238, *Secretary, United States Department of Education* v. *Betty-Louise Felton, et al.* and case No. 84-239, *Chancellor of the Board of Education of City of New York* v. *Betty-Louise Felton, et al.*, and a total of one hour is allotted for oral argument.

October 9, 1984

SUPREME COURT OF THE UNITED STATES

No. 84-238

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

Appeal from the United States Court of Appeals for the Second Circuit

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. This case is consolidated with case No. 84-237, *Yolanda Aguilar, et al.* v. *Betty-Louise Felton, et al.* and case No. 84-239, *Chancellor of the Board of Education of City of New York* v. *Betty-Louise Felton, et al.*, and a total of one hour is allotted for oral argument.

October 9, 1984

SUPREME COURT OF THE UNITED STATES

No. 84-239

CHANCELLOR OF THE BOARD OF EDUCATION OF CITY OF NEW YORK, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

Appeal from the United States Court of Appeals for the Second Circuit

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. This case is consolidated with case No. 84-237, *Yolanda Aguilar, et al.* v. *Betty-Louise Felton, et al.* and case No. 84-238, *Secretary, United States Department of Education* v. *Betty-Louise Felton, et al.*, and a total of one hour is allotted for oral argument.

October 9, 1984

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(18) (19)

Nos. 96-552 and 96-553

Supreme Court, U.S.
FILED
FEB 28 1997
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

RACHEL AGOSTINI, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL., RESPONDENTS.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL., RESPONDENTS

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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VOLUME II
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Petitions for Writ of Certiorari Filed October 7, 1996
Certiorari Granted January 17, 1997

524 JP

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DATE	PROCEEDINGS
09/26/85	ORDER by Judge Neaher enjoining delivery of Title I services on premises of sectarian schools
03/26/86	MANDATE of court of appeals affirming Judge Neaher's decision
10/25/95	MOTION by deft. Chancellor of the Board of Education of the City of New York, for relief from the judgment dated Sept. 26, 1985.
10/25/95	MEMORANDUM by Chancellor of Board in support of motion for relief from the judgment dated Sept. 26, 1985.
11/03/95	ORDER dated 10/26/95 that 78cv1750 be assigned to Judge Gleeson as related to 88cv96.
12/26/95	COPY LETTER dated 12/19/95 from W. Scott Simpson, Esq. to counsel enclosing Secretary, Dept. of Education's response to chancellor's motion.
01/10/96	AFFIRMATION of Stanley Geller, attorney for plaintiffs in opposition to defendant Chancellor of the Board of Education of the

01/19/96	MOTION by defendant-intervenors for relief from judgment.
01/19/96	MEMORANDUM by defendant-intervenors in support of motion for relief from judgment.
01/19/96	REPLY Declaration of Margaret Weiss, Director of the Bureau of Nonpublic School Reimbursable Services of the Bd. of Ed.
01/22/96	RESPONSE by U.S. Dept. Education to defendant-intervenors' motion for relief from judgment.
05/09/96	MOTION HEARING before Judge Gleeson on 5/9/96, regarding motion for relief from the judgment dated Sept. 26, 1985. Decision reversed.
05/13/96	STIPULATION AND ORDER dated 5/6/96 allowing intervention and adding a defendant. 1) The fourteen parents named in paragraphs a through m shall be permitted to intervene as defendants in this case. 2) Yolanda Aguilar, Lillian Colon, Miriam Martines, and Belinda Williams shall be permitted to withdraw as defendant-intervenors. 3) The Board of Education of the City School District of the City of New York shall be added as a party defendant. 4) The caption of this case shall be amended as in the attachment to this Stipulation. (signed by Judge John Gleeson)

defendant. 4) The caption of this case shall be amended as in the attachment to this Stipulation. (signed by Judge John Gleeson)

05/24/96 ORDER denying motion for relief from judgment dated Sept. 26, 1985.

05/24/96 LETTER, dated 5/15/96 from Kevin T. Baine to Judge Gleeson, for the purpose to supplement the record on the issues of Rule 60(b) motions.

06/07/96 Chancellor and Board of Education's NOTICE OF APPEAL filed (96-6160)

06/18/96 NOTICE OF CROSS APPEAL by Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side, Allen H. Zelon. Service made by clerk.

06/18/96 NOTICE OF APPEAL by Defendant-Intervenor Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then, Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens, Rosemarie Vasquez.

07/03/96 Appellants-cross-appellees Chancellor and Agostini briefs and joint appendix filed

08/02/96	Appellees-cross-appellants Felton, et al. brief filed
08/05/96	Appellee Secretary, U.S. Dept. of Education brief filed
08/16/96	Reply briefs of Chancellor/Board of Education and Agostini filed
08/23/96	Reply brief of Felton, et al. filed
08/30/96	ORAL ARGUMENT before KEARSE, MAHONEY C.JJ., POLLACK, D.J.
08/30/96	Judgment filed; judgment of the district court is AFFIRMED substantially for the reasons stated in Judge Gleeson's Memorandum and Order dated 5/20/96 by detailed order of the court without opinion filed. [Per Judge Kearse] (96-6160, -6180, -6181)
10/07/96	Petitions for writs of certiorari filed by Agostini and Chancellor/Board of Education
10/15/96	MANDATE of court of appeals issued

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H.ZELON,

Plaintiffs,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINES, and BELINDA WILLIAMS,

Defendant-Intervenors.

NOTICE OF MOTION BY DEFENDANT CHANCELLOR FOR RELIEF FROM JUDGMENT

78 CV-1750 (ERN)

----------x

PLEASE TAKE NOTICE that, upon the declaration of Margaret O. Weiss, dated October 16, 1995, and the charts and exhibits annexed to the declaration and all other

pleadings and proceedings herein, defendant Chancellor of the Board of Education of the City of New York, will move this Court, on a date to be determined after this case has been reassigned (the judge who was previously assigned the case, the Honorable Edward R. Neaher, is now deceased), at the United States Courthouse, for the Eastern District Court of New York, located at 225 Cadman Plaza East, Brooklyn, New York, for an order pursuant to Rule 60 of the Federal Rules of Civil Procedure, granting relief from this Court's Judgment, dated September 26, 1985, and granting such other relief as to this Court seems just and proper.

Dated: New York, New York
October 24, 1995

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

DECLARATION

78 CV-1750 (ERN)

Plaintiffs,

- against-

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

-and-

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Intervenor-Defendants.

----------x

MARGARET O. WEISS, declares, pursuant to 28 U.S.C. § 1746, under penalty of perjury under the laws of the United States of America, that the following is true and correct:

1. I am the Director of the Bureau of Nonpublic School Reimbursable Services of the Board of Education of the City School District of the City of New York. I am responsible for implementing various federal programs which provide instructional and support services to students who attend private schools within New York City. One of these federal programs is Chapter 1 of Title I of the federal Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. §§ 2701, et seq. ("Chapter 1").

2. I have been an educator for over 31 years and have worked in remedial education, as a teacher, supervisor and administrator, for over 27 years. I have worked for the Board of Education of the City School District of the City of New York ("the Board" or "the Board of Education") since 1965.

3. I have worked for the Bureau of Nonpublic School Reimbursable Services ("the Bureau") since 1972. In that year, I became a field supervisor for corrective reading for the Chapter 1 (then called Title 1) program, and in 1974 I became the coordinator of the Chapter 1 Reading Skills Center program, which serves severely disabled readers. As coordinator, I was responsible for training and supervising the teaching and administrative staff of the program, developing courses of instruction for over 400 children and implementing the program. In 1979, I became Assistant Director of the Bureau, and in 1985, I became Director of the Bureau.

4. I hold a Masters of Science in Education and have completed an additional 30 graduate credits in School Supervision and Administration. I hold two professional teaching licenses and two professional certifications in school administration from the New York State Education Department. I also hold one teaching license and three licenses in education administration from the Board of Education.

5. I submit this declaration in support of the motion of defendant Chancellor of the City School District of the City of New York (denominated in the caption as the Chancellor of the Board of Education of the City of New York), which seeks relief from this Court's Judgment, dated September 26, 1985, *aff'd*, 787 F.2d 35 (2d Cir. 1986), which permanently enjoined the Chancellor "from using public funds for any plan or program under [Chapter 1] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City...." (Slip opinion, at 2. A copy of the judgment is annexed as Exhibit "1.")

6. By resolution dated July 7, 1995 the Board of Education of the City School District of the City of New York (hereafter "the Board of Education"), authorized the commencement of legal proceedings seeking relief from the judgment. The Board of Education concluded that these proceedings should be commenced because of the adverse effects of the judgment, and the clear indication, based on the opinions of several Justices of the United States Supreme Court, that the judgment no longer reflects current law. In pertinent part, the resolution authorizes that relief be sought from the judgment:

> ... in light of the significant costs associated with the alternative service delivery methods now used which divert scarce funds from the provision of remedial services to both public and nonpublic school students, the educational superiority of on-premise services, and the opinion of several United States Supreme Court Justices that Aguilar v. Felton should be revisited....

(A copy of the resolution is annexed as Exhibit "2.")

Brief Overview of the Chapter 1 Program

7. Chapter 1 was first enacted in 1965. The statute provides federal funds for remedial, supplementary education and support services for elementary and secondary school students. To be eligible, a student must have below grade level educational achievement in reading and/or mathematics and reside within the attendance boundaries of a participating public school located in a low income area. (20 U.S.C. §§ 2721(a), 2723(a); 34 C.F.R. § 200.6(c).)

8. The statute has always provided that both public school and private school students are eligible for Chapter 1 services. Implementing regulations promulgated by the United States Department of Education required that private school students receive services that are "comparable" to those provided to public school students. More recent statutory enactments and regulations continue that requirement by mandating that there be "equitable" participation of eligible students in the Chapter 1 program, without regard to whether they attend public or private schools. (20 U.S.C. § 2727(a), (b)(2); 34 C.F.R. §§ 76.654(a), 200.50(a)(1), 200.71(b).) (Effective July 1, 1995, pursuant to the Improving America's Schools Act of

1994, Pub. L. No. 103-382, 108 Stat. 3517, the name of the program will change from "Chapter 1 of Title I" to simply "Title I." However, in this declaration, the program is referred to as Chapter 1, and the cited statutory provisions are those in effect prior to July 1, 1995, since this motion primarily concerns a time period prior to July 1, 1995.)

9. Pursuant to the statute, Chapter 1 services are normally implemented by a local educational agency ("LEA"), under the supervision of a state educational agency ("SEA"). (20 U.S.C. § 2722(b).) The Board of Education is the LEA for the City of New York.

10. It should be noted that the City of New York is also subdivided into thirty-two community school districts, each of which has a community school board. A variety of functions are delegated to the community school boards by the Board of Education. (New York Education Law §§ 2564, 2590, *et seq.*) A few of the community school districts administer a portion of the Chapter 1 funds that are allocated to serve the private school students in their districts. However, the Chancellor, through my Bureau, administers the vast majority of the Chapter 1 funds that are allocated to private school students in New York City. Accordingly, except as otherwise noted, the numbers and other details provided herein refer to the Chapter 1 services for private school students administered by the Chancellor.

11. The Board of Education is the largest LEA in the nation, and our Chapter 1 program is the largest in the nation. In school year 1993-94 (the most recent year for which complete statistics are available), the program served 259,097 students. Of these, 237,200 students attended public school and 21,897 students attended private school.

12. The basic educational composition of Chapter 1 services for private school students, as provided by the Board of Education, has remained essentially unchanged, from Chapter 1's inception in 1965 until today. Only secular, remedial instruction is provided. Instruction is given in three basic areas--reading, mathematics and English as a Second Language.

13. In addition, the program provides clinical and guidance support services for eligible children who have emotional or family problems which interfere with their academic performance. The clinical services are provided by social workers and psychologists, and the guidance services by guidance counselors.

14. The Board provides Chapter 1 services only to eligible students who attend private schools; it does not provide services to the private schools, nor to the general student populations of these schools.

15. These same basic services have been provided over the three decades that the Chapter 1 program has been in existence. These services have always been designed to supplement, and not supplant, the students' regular classroom instruction. What has changed, as a result of this litigation, have been the methods by which the services have been delivered to students who attend private religious schools. This case reached the United States Supreme Court, which held, in *Aguilar v. Felton*, 473 U.S. 402 (1985) ("*Aguilar*"), that the Board's provision of Chapter 1 services by publicly employed teachers and other professional employees inside religious schools violated the Establishment Clause. This Court's September 26, 1985 judgment, enjoining this method of providing Chapter 1 services, followed.

Chapter 1 Services for Private Schoolchildren Before the Judgment

16. When the Chapter 1 program began, in 1965, the Board of Education provided services to private school students after the students' regular school day was completed. However, it was quickly concluded that these after school services for private school students were not as effective as, and therefore not comparable to, the Chapter 1 services for public school students, which were provided during the regular school day. Both the students and teachers were tired. In addition, parents had serious concerns about the younger children having to get home in the dark during the winter months, and older children had scheduling conflicts created by jobs and other activities.

17. The Board of Education consulted with other LEAs around the country, and learned that they were experiencing similar difficulties with after school Chapter 1 programs. Indeed, one district court subsequently found that an after school Chapter 1 program for private school students was not comparable to the regular school day program for public school students. Based on our own experience, and the reported experience of other school districts, the Board of Education concluded that Chapter 1 services for private schoolchildren should be provided during the regular school day, to ensure that they would be comparable to the Chapter 1 services for public schoolchildren.

18. Accordingly, after the first year of the program, the Board provided Chapter 1 services to all private schoolchildren during the course of their regular school day, by sending its teachers, guidance counselors, and other professional and instructional employees into

classrooms in the private schools (including the religious schools). These classrooms were designated as Board of Education Chapter 1 rooms and in most instances were used exclusively for the Chapter 1 program.

19. As is clear from the record in this case, the method of providing Chapter 1 services to religious school students prior to the judgment, in-school services during the regular school day, was highly successful from an educational standpoint. Annual reports by independent evaluators found that private school students who participated in the program showed measurable improvement in overcoming their educational achievement deficits. The program was also far less expensive to operate than an off-premises program. (For a complete description of the pre-judgment program, the Court is referred to the Joint Appendix which was submitted to the United States Supreme Court, a copy of which is annexed as Exhibit " 3. ")

20. The Board's program was not atypical; beginning in 1965 or soon thereafter, throughout New York State, and upon information and belief, throughout the nation, Chapter 1 services for children attending religious schools were largely provided inside the religious schools by publicly employed teachers and other professionals. (Letter dated July 12, 1985 from Gordon Ambach, Commissioner of the New York State Education Department, to William Bennett, Secretary of the United States Department of Education, annexed hereto as Exhibit "4.")

Developing Alternative Service Delivery Methods After this Court's 1985 Judgment

21. During the 1984-85 school year, the Board provided Chapter 1 services to 172,263 public school

students and 21,958 private school students, for a total of 194,221 students. All but 52 of the participating private school students attended religious schools, and were therefore affected by this Court's judgment. This meant that new methods of delivering Chapter 1 services had to be devised for these nearly 22,000 private schoolchildren, who attended 252 private religious schools. (As used hereafter in this declaration, the term "private school" refers to those schools whose students' receipt of Chapter 1 services is affected by this Court's judgment following the *Aguilar* decision.)

22. In August 1985, the United States Department of Education issued a written Guidance on *Aguilar v. Felton* and Chapter 1 (a copy of the Guidance is annexed hereto as Exhibit "5.") In question and answer number 4, the federal government stated that an LEA's Chapter 1 application could not be approved, and Chapter 1 funds could not be expended, unless the LEA's Chapter 1 program provided for equitable services to private school children. Thus, the Board was legitimately concerned that if its post-*Aguilar* Chapter 1 services for private schoolchildren were not equitable, its entire Chapter 1 program, for both public and private schoolchildren, would be jeopardized.

23. On September 26, 1985, this Court issued its judgment permanently enjoining the provision of Chapter 1 services by public school teachers and guidance counselors on the premises of sectarian schools. The judgment included a stay until the beginning of the 1986-87 school year, to give the Board an opportunity to develop alternative means of delivering Chapter 1 services to the students who attended these sectarian schools. (Exhibit " 1, " annexed.)

24. By memorandum dated July 22, 1985, the

New York State Department of Education identified four possible alternatives for the delivery of Chapter 1 services to private schoolchildren. These four suggested alternatives were: 1) in public schools; 2) in neutral sites; 3) in mobile or portable vans equipped as classrooms and 4) through instructional technology. (Memorandum dated July 22, 1985 from Robert D. Stone, General Counsel of the New York State Department of Education to District Superintendents, etc., annexed hereto as Exhibit "6").

25. These four suggested alternatives are the four delivery methods which the Board has used to comply with this Court's judgment following *Aguilar* (post-*Aguilar* delivery methods"). For purposes of this declaration, the four methods are referred to as: (1) "public school sites"; (2) "MIUs," which are mobile instructional units; (3) "leased sites," which are sites leased by the Board of Education from private entities and (4) "CAI," which is "computer-assisted instruction."

26. The Board has used public school sites, leased sites and MIUs since the 1986-87 school year, when post-*Aguilar* delivery methods were first implemented. The Board began using CAI in the 1987-88 school year.

27. As discussed further below, providing Chapter 1 services to students inside their own schools is preferable to using the post-*Aguilar* delivery methods. Judge Friendly had noted that alternatives to in-school services "are almost certain to be less effective, more costly, or both." *Felton v. Secretary U.S. Dep't of Educ.*, 739 F.2d 48, 71 (2d Cir. 1984). Judge Friendly's prediction was accurate; the alternatives have been less effective and more costly than in-school services.

Public School Sites

28. A public school site is a room or rooms in a public school that are used to provide Chapter 1 services for private schoolchildren. The rooms may be located anywhere in the building. Obtaining public school sites for use during the regular school day is difficult, because of the lack of excess space in many public schools, and the educational and logistical problems created by transporting children to and from a public school site. In 1985-86, school overcrowding was so severe in some neighborhoods, that certain public schools were busing their own students to different schools for the entire school day. As discussed further below, the space shortage in public schools has become far worse since 1986.

29. The use of public school sites also creates a loss of instructional time, which is a serious concern for Chapter 1 students. The Board therefore sought to minimize travel time, and established a maximum one way vehicular travel time between the two schools of ten minutes. The necessary limitation on travel time further restricts the availability of appropriate public school sites. Insofar as an alternative site is closer to the private school than is the public school site, it is educationally preferable to use the alternative site.

30. To minimize the loss of instructional time, most private school students are transported between the private school and the Chapter 1 public school site by mini-vans or buses. These vehicles are owned and operated by private companies which are under contract to the Board to transport students between their homes and schools at the beginning and end of the school day, and are thus available for Chapter 1 purposes from approximately 9 a.m. to 2:30

p.m. Private school students who attend a public school site which is within one block of their own school normally walk.

31. For the 1986-87 school year, the Board was able to offer Chapter 1 services at public school sites to students attending 194 private schools; however the offer was only accepted by students from 52 private schools. The result was a dramatic decrease in the number of private school students receiving Chapter 1 services. In school year 1986-87, the first year in which the post-*Aguilar* program was implemented, the overall number of participating private school students decreased by approximately 50% from the number participating in the prior school year.

32. Objections to the public school sites, as expressed by many private school principals, included: the loss of instructional time caused by travel (it was noted that the travel time computed by the Board was just for travel between the two schools, and that additional time was lost in walking to and from classrooms, particularly those on upper floors); drug dealing and other criminal activities near the private school, the public school or both; heavy traffic and high accident rates on the proposed route between the two schools; and the reluctance or unwillingness of many parents to have their children leave their school building or travel during the school day. Some private school principals indicated that their students would attend public schools which were closer to the private school than the public school site offered; however there was no available space in those pubic schools.

33. Since the post-*Aguilar* delivery methods were instituted, there has been a continuing decline in the number of public school sites which have been utilized in the Chapter

1 program. In school year 1986-87, 3,578 students attending 52 private schools received their Chapter 1 services at 49 public school sites. During 1993-1994, 1,219 students from 16 private schools received services at 15 public school sites (either exclusively or as part of a combination program, as discussed below).

34. Most of the decrease in public school utilization is due to increased overcrowding in the public schools. Of the 34 public school sites which were dropped between 1987 and 1994, 23 were lost because the public school needed the classroom space for its own students' regular educational program.

35. On October 31, 1986, the student enrollment in New York City's public schools was 940,208. On October 31, 1994, the student enrollment was 1,034,235. This is an increase of 10%, in just 8 years.

36. As is fully described in a January 1995 report by the Comptroller of the City of New York, Overcrowding in New York City Public Schools: Where Do We Go from Here? (a copy is annexed hereto as Exhibit "7"), public school overcrowding became particularly severe starting in the late 1980's. The major cause has been a rapid increase in enrollment growth since 1989. In addition, in 1988, the Board significantly reduced class size, which further increased overcrowding. The rate of increased enrollment is now 21,000 students per year, due primarily to immigration and the high number of births. The current growth rate is expected to continue into the next century. (Exhibit "7," pp. ES1, 1, 3 (figure 2).)

37. As the Comptroller's Report indicates, the school system is now so crowded that 90,000 students,

which is 9% of the public school population, lack regular classroom seats. Since the construction of new school buildings is too costly and too slow a process to address the great and growing space need, other solutions, some drastic, are being explored. These include double shifts (students attend school on different shifts), a year-round school calendar and large-scale busing of students to other, underutilized schools. (Exhibit "7," pp. ES1, 30-50).

38. For purposes of the Chapter 1 program, the overcrowding situation is even worse than the overall figures suggest, since a majority of the Chapter 1 private school students attend school in areas where the public schools are most overcrowded. In the 1993-94 school year, 59% of the private school Chapter 1 students attended schools which were located in the 15 most overcrowded community school districts. As explained in the Comptroller's Report, increased immigration is the major cause of the increase in enrollment, and immigrants frequently congregate in particular neighborhoods. As a result, the overcrowding is far more severe in these neighborhoods. (Exhibit "7," pp. 4-8, 12-22). Since eligibility for Chapter 1 includes a requirement that the student reside within the attendance boundaries of a participating public school in a low-income area, the Chapter 1 programs are often concentrated in areas where large numbers of immigrants reside and the public schools are most crowded.

Mobile Instructional Units ("MIUs")

39. As discussed above, when the Board first created its post-*Aguilar* delivery methods for the 1986-87 school year, there were many more public school sites available than in subsequent years. However, even in 1986, no appropriate public school sites could be found for the

Chapter 1 students of 48 private schools.

40. Accordingly, mobile instructional units were obtained for these eligible private school students. Based on the number of Chapter 1 students in these private schools, and the types of services provided to these students, it was determined that 70 MIUs would be required.

41. The MIUs are large vehicles equipped as classrooms. They have been specially designed to comply with the stringent New York City health and safety code requirements for space occupied for the instruction of children.

42. The MIUs have also been specially designed to meet the needs of the Chapter 1 program. Under New York State Department of Education guidelines, which apply to both public and private school students, the maximum size for a Chapter 1 class with one teacher is 10 students. However, space is also required for students' sessions with guidance counselors, social workers or school psychologists, and for conferences between Chapter 1 staff and private school staff or private school parents.

43. The MIUs are expensive, and the Board accordingly sought to maximize the use of each MIU, and thereby minimize the number of MIUs and their total cost. The interior of each MIU contains a folding partition; when the partition is closed, the larger section can accommodate a class of 10 students and a teacher, and the smaller section, which seats 3 or 4 students, can simultaneously accommodate either a small English as a Second Language class, or a guidance session, or a parent-teacher conference, etc.

44. The Board had no facility in which a large number of vans could be garaged, stored, cleaned, repaired and maintained. Other school systems had found such facilities very expensive to build and operate, and in their experience, vandalism and insurance coverage were also expensive. Accordingly, the MIU contract requires that the supplier also provide garage, maintenance, repair, cleaning, security and insurance.

45. The contract further requires the supplier to build and maintain spare vehicles, which can be used as replacements when necessary, to avoid disruptions in service. Finally, the contract requires that the supplier provide a driver for each MIU, who not only drives the MIU between the garage and the private school, but remains in the MIU or the area surrounding the MIU during the school day to provide security. Security is a serious concern in regard to the MIUs, since they are parked in the open on public streets, usually in high-crime areas. There have been incidents, including one shooting, which occurred right outside an MIU.

46. Three photographs, showing the exterior and the interior of MIUs leased from Ferdinand Arrigoni, Inc. (d/b/a New York Bus Service) are annexed hereto as Exhibit "8." The serious security concerns associated with the MIUs are reflected in the design of these vehicles. As the photographs show, the windows in the classroom areas are all relatively high and small, and the windows are covered with a heavy wire grid.

47. Each MIU bears the words "New York Bus Service" on all four sides in large, contrasting lettering, and bears a large decal of the Board of Education seal on two sides (see photographs at Exhibit "8.") The MIUs do not

obtain electricity from the private schools; each MIU carries a generator which supplies all electrical power. There are no telephones in the MIUs. Each MIU is equipped with a walkie-talkie, which is used by the driver for emergency communication with the private school.

48. There is limited storage space on the MIUs for equipment, material and supplies. However, since the space is not unlimited, the Chapter 1 teacher usually stores surplus supplies and materials in the private school. The teacher replenishes supplies from the surplus stock approximately once a month, or less frequently. There are no bathrooms or lunchrooms on the MIUs.

49. When in service, the MIUs are parked on a public street near the private school whose students are receiving services; the MIUs are never parked on private school property. The MIUs are generally parked either on the same block as, or around a corner from, an entrance to each private school. When not in use for Chapter 1 purposes, the MIUs are garaged in a facility owned or leased by the supplier.

50. The only instruction provided in MIUs is secular Chapter 1 instruction. They are not used for instruction in religious subjects, nor for the private schools' educational programs.

51. The Board designed specifications to meet the applicable code requirements and educational needs, and then solicited competitive bid proposals from private contractors for the leasing of MIUs. During the first three school years of our post-*Aguilar* program, the Board of Education leased 70 MIUs. The Board then entered into an agreement to lease an additional 58 MIUs, which were delivered over the

next two school years. By the end of 1990-91, delivery was complete and the Board was leasing 128 MIUs. No additional MIUs have been leased; indeed, in the 1994-95 school year, the number of MIUs was reduced to 126.

52. The number of students receiving services in MIUs (either exclusively or as part of a combination program, as discussed below), has increased over the years. In 1986-87, 5,503 students from 72 private schools received services in MIUs; in 1993-94, 11,622 students from 141 private schools received services in MIUs.

Leased Sites

53. A leased site is a building or part of a building that the Board leases and uses to provide Chapter 1 services to private school students. From the time of the *Aguilar* decision to the beginning of the 1986-87 school year, the Board made inquiries concerning nearly 500 potential leased sites. Approximately 475 of the original 500 potential leased sites were rejected for one or more reasons: they were not religiously neutral; they had no space available for Chapter 1 purposes; the landlord was unwilling to rent the site to the Board; they were unsuitable for classroom instruction or they would have required extensive, lengthy, and costly renovations. Of the original 500 potential leased sites, 190 were owned by religious organizations. The Board rejected 141 of these 190 sites because they were not religiously neutral.

54. The Board approves leased sites without regard to the religious affiliation, if any, of the owner. Most but not all of the leased sites used for Chapter 1 services are owned by religiously-affiliated organizations. However, neither the interiors nor the exteriors of the buildings where

the leased sites are located bear any visible religious symbols. If such symbols are present, they are either removed or covered. The leased sites are identified as Board of Education facilities, by signs that read: "New York City/ Board of Education/Chapter 1 Facility".

55. Further, the only activity which occurs at each leased site is secular Chapter 1 instruction. The leases for these sites provide that, for the duration of the lease, the Board of Education has exclusive use and occupancy of the site and no religious activity or instruction may occur anywhere in the building where the site is located.

56. Each of the Board's leased sites, is in a building that is separate from the private school building(s) whose students are served at the sites. Near the beginning of the 1986-87 school year, the Board leased thirteen sites to provide Chapter 1 services to private school students.

57. Of these thirteen leased sites, twelve were closer to at least one of the private schools whose students they served than was the nearest public school with available space (and the thirteenth site was approximately the same distance). Thus, the use of these leased sites reduced the travel time and increased the regular classroom instructional time for the students.

58. In 1986-87, 1,580 students from 17 private schools received Chapter 1 services in leased sites. Commencing in January 1987, the annual rental for these thirteen sites was $4.75 per square foot, which was at the low end of the range of the Board's usual cost for similar leased space.

59. The use of leased sites has continued in

similar fashion. In the 1993-94 school year, 1,601 students from 14 private schools received Chapter 1 services in eleven leased sites (either exclusively or as part of a combination program, as discussed below).

Computer-Assisted Instruction

60. In computer-assisted instruction ("CAI"), private school students receive Chapter 1 instruction through computers that are linked by modem or by dedicated telephone lines to a Board of Education office. The Board began using CAI to serve private school students in the 1987-88 school year.

61. CAI utilizes both desk-top computers that are installed in the private schools, usually in dedicated rooms used exclusively for CAI (referred to as "CAI rooms"), and lap-top computers that are distributed to private school students for use at home.

62. Chapter 1 teachers are not present in the private school during CAI use. When students use the computers installed in the private schools, data recording their work is transmitted electronically to a Board of Education office, where Chapter 1 teachers monitor the students' work, print and review reports of their progress, and adjust each student's curriculum as appropriate.

63. The only Board of Education employee who is present in the CAI room while the private school students work on the computers is a non-instructional technician (referred to as a "CAI technician"). These technicians are non-professional employees. The CAI technician's primary duty is to maintain order among the students. They also take attendance, maintain student records and perform elementary

functions with the computers, specifically turning them on and off, rebooting them and bringing up the program, if necessary.

64. There are many electronic and physical safeguards to insure that the CAI computers are not usable for any purpose other than Chapter 1 instruction. Some of the computers are "dumb" terminals that do not have their own central processing units or disk drives. These "dumb" terminals automatically connect themselves to the main computer located at a Board of Education site when they are turned on; the main computer transmits the Chapter 1 lessons electronically to the terminals in the private schools.

65. The remainder of the CAI computers installed in the private schools are personal computers that have their own central processing units and floppy disk drives. The floppy disk drives are covered by locked security devices. The Board of Education has sole possession of the keys to the security devices.

66. Not only is tile software used in these CAI computers limited to that installed by the Board or at its direction, but the Board also electronically limits access to these computers to students enrolled in the Chapter 1 program. The Board prohibits students who are not registered for CAI from using, the Chapter 1 computers. Private school staff are also prohibited from using the CAI computers at any time.

67. The Board gives each student enrolled in CAI a password. To access a CAI computer, a student must enter his or her password, which automatically places the student in the program designated for him or her by a Chapter 1 teacher. The computers located in the private

schools cannot be activated or used in any other way, except to print a student progress report pursuant to an electronic command.

68. All but a few of the computers installed in the private schools are located in separate rooms, in which no other activity occurs while Chapter 1 CAI is given ("CAI rooms"). The only persons who may be present in the CAI rooms during CAI sessions are the students and the Board's CAI technician. Religious symbols in the CAI rooms are prohibited.

69. Almost all CAI rooms are used only for Chapter 1 instruction. In three schools in which CAI sessions are held only two or three times a week, the CAI rooms are used for other purposes on the days when there are no CAI sessions.

70. In a few private schools, the small number of Chapter 1 eligible students warranted the installation of only one computer. Beginning in April 1989, one CAI computer (each a "dumb" terminal type) was installed in some of these schools in a room that the schools may use for other purposes (such as a supply room) at any time. Through the end of school year 1990-91, this arrangement has been used in a total of four private schools. None of those four schools continue to use this arrangement; however, this arrangement has been implemented in two other private schools since 1991.

71. In addition to the CAI computers that are installed in private schools, the Board of Education has acquired and distributed "lap-top" computers for use in the homes of some Chapter 1-eligible private school students. These lap-tops have been electronically "encrypted" so that

they are only usable for Chapter 1 instruction.

72. Each lap-top is a PC that has only a floppy disk drive (no hard disk drive). The PC hardware (i.e., "mother board") has been altered so that the disk drive can read only the floppy disks that the Board provides with the computers. These floppy disks are dialing disks; their only capability is to automatically dial a local area network when the computer is turned on, through an internal modem, which connects the lap-top to the software company. The Chapter 1 instructional programs are then transmitted to the lap-top. The Chapter 1 teacher at the Board of Education office can electronically monitor the student's work and adjust the lessons appropriately. The process is similar to that used with the CAI computers installed in the private schools.

73. The Board selects all the software which is used in CAI. No software is used which could be diverted for religious purposes, or for any secular purpose other than CAI. For example, to ensure non-divertibility, the Board does not use wordprocessing, graphic or spreadsheet software in CAI.

74. CAI was first used in school year 1987-88, when 2,135 students from 22 private schools were served by CAI. The use of CAI has increased over the years; in 1993-94, 9,662 students from 149 private schools used CAI.

75. From an educational perspective, as the Chapter 1 achievement tests demonstrate, it is preferable for students to have face-to-face interaction with teachers, rather than to work only on computers. Therefore, the Board implemented combination services, in which private school students who receive CAI also receive some face-to-face

instruction from Chapter 1 teachers in public school sites, MIUs, or leased sites.

76. In this combination program, CAI is generally used two days per week and face-to-face instruction one day per week. The Board has been able to provide combination services to only a small portion of the students who receive CAI, because of the limited availability of public school sites, leased sites and MIUs, and because face-to-face services were declined in some instances because private school students did not want to leave their school building.

77. Combination services were offered beginning in school year 1988-89. The number of students who received combination services are a subset of the number of students who received CAI. In school year 1988-89, 1,003 students from 25 private schools received Chapter 1 combination services. In subsequent school years, the use of combination services has increased; in 1993-94, 2,115 students from 63 private schools received combination services.

Problems Created by Compliance with the Judgment

78. Compliance with this Court's judgment has created a system for provision of Chapter 1 services to private school students that is more expensive, less educationally effective and less administratively efficient than the in-school delivery of Chapter 1 services which was used for private school students prior to the judgment. In-school delivery of Chapter 1 services is in all ways preferable, and continues to be used for all public school students throughout New York City.

79. Of greatest concern, from an educational

perspective, is the time spent by students in moving between their regular classroom and their Chapter 1 site. This is time lost from their regular classroom instruction and is an especially serious concern for Chapter 1 students, since they are the students who are most in need of instruction. Tle public school site and leased site alternatives often entail significant travel time.

80. Additional instructional time loss and disruption is caused for both the Chapter 1 students and their regular school classmates because Chapter 1 students have to leave their school buildings to receive services at the public school sites, leased sites and MIUs, and therefore have to put on and remove outer garments. This is not a trivial disruption, since most of the Chapter 1 private school students are in the elementary school grades, and this task is often a major undertaking for young children in the winter.

81. Another consideration is safety. Most of the private schools are located in low income neighborhoods, as are most of the alternative Chapter 1 sites. Many of these neighborhoods have high rates of violent crime. An MIU parked on the street in a high-crime area is more exposed and not as secure as a school building. Walking or even driving children through high-crime areas raises safety considerations. In fact, since the post-*Aguilar* delivery methods were instituted, a few incidents have occurred which were upsetting to the students, but fortunately resulted in no harm. There was a sniper outside one school when the students were scheduled to be leaving, gangs have threatened some students, and drug dealing has occurred in the vicinity of students. The Board has considered the levels of violence and crime in particular neighborhoods in determining the appropriate method of service delivery for students of a particular school.

82. The CAI alternative avoids the instructional time loss, disruption and safety concerns created by the other post-*Aguilar* delivery methods. However, while CAI has educational value, it is not as educationally effective as direct face-to-face interaction between student and teacher. Although as a group, the Chapter 1 private school students who receive only CAI instruction do meet the New York State Department of Education's educational gain standards for the Chapter 1 program, they do not perform as well, overall, as the students who receive face-to-face instruction.

83. Further, for Chapter 1 instruction to effectively supplement the students' regular instruction in reading, mathematics or English as a Second Language, there must be coordination between the regular and Chapter 1 curricula, so that Chapter 1 instruction can supplement and reinforce the regular classroom instruction.

84. For this reason, the Chapter 1 statute and regulations and New York State Education Department guidelines mandate that the LEA's Chapter 1 program include effective strategies to coordinate the Chapter 1 curriculum with the students' regular educational programs, regardless of whether the students attend public or private school, and mandate consultation between Board of Education and private school officials to develop Chapter 1 services that effectively supplement the students' regular classroom instruction. (20 U.S.C. §§ 2722(c)(3), 2727(a), 34 C.F.R. §§ 200.51(a), 200.70.) In addition, the New York State Education Department guidelines mandate that Board of Education Chapter 1 staff and private school staff coordinate their activities to achieve the educational objectives for their students.

85. Pursuant to Guidance issued by the United

States Department of Education, the public school sites, neutral sites and MIUs are used for consultations concerning the Chapter 1 program between Board of Education and private school staff. (A copy of the June 1986 Guidance on *Aguilar v. Felton* and Chapter 1, issued by the United States Department of Education is annexed as Exhibit "9;" questions 24-28 concern consultation.) It is often extremely burdensome to hold consultations between the Board's Chapter 1 staff and the private school staff when the Chapter 1 services are given at a public school site or leased site that is located a mile or more away from the private school. The private school staff must travel to the public school or leased site for a consultation meeting.

86. An alternative is to hold consultations between the Board's Chapter 1 staff and private school staff by telephone. (See federal Guidance, Exhibit "9" annexed, question 28.) Obviously, this is not as effective as meetings, especially when the teachers need to refer to records.

87. For CAI, the situation is even more cumbersome. The "consultation" by the Board of Education Chapter 1 teacher, who is located in a Board of Education office which may be across the City from the private school, is primarily through written computer-generated student progress reports, which are printed out in the CAI room upon electronic command. These reports are then delivered by the CAI technician to the private school principal.

88. The use of the MIUs is also cumbersome and inefficient for our Chapter 1 staff. Since there is limited storage space for records on the MIUs, and since most of our staff is itinerant (approximately 66% of the teachers, 88% of the guidance counselors, and 100% of the psychologists and social workers who work fulltime, serve

students from more than one private school during the course of their workweek), these professionals must frequently carry their records and files with them on a daily basis.

Costs of Compliance with the Judgment

89. Finally, taken together, the post-*Aguilar* delivery methods are far more costly than was the pre-judgment provision of services in the private schools. The result has been a very significant expenditure of funds simply to deliver services in accordance with the judgment.

90. The Board of Education has spent $93,245,424 for the costs of compliance with the judgment for the school years 1986-87 through 1993-94. Of these funds, $7,920,528 were taken "off-the-top" (see discussion below), in other words, from Chapter 1 funds which could otherwise have been used to provide additional instructional and support services to both public and private (including nonsectarian) schoolchildren in New York City. For ease of comprehension, a chart has been prepared showing these expenditures, broken down by year and funding source. This chart is annexed as "Chart A" and is incorporated, as though fully set forth, herein.

91. The costs of complying with the *Aguilar* decision have been Burdensome to LEAs throughout New York State and the entire nation. Both the New York State Legislature and the United States Congress have recognized that this is a serious problem, and accordingly have made appropriations to meet some of these compliance costs.

92. After *Aguilar*, the State of New York allocated funds to cover part of the noninstructional costs incurred by LEAs in response to *Aguilar*. Section 9 of Chapter 683 of

the Laws (of New York) of 1986, provided for the apportionment of $10 million dollars to LEAs around the State, allocated under Chapter 53 of the Laws of New York (the local assistance budget). Annual allocation of state funds under Chapter 53 began in the 1986-1987 school year, and continued through the 1990-1991 school year. No state funds have been allocated since then.

93. In 1988, the Chapter 1 statute was amended by enactment of 20 U.S.C. § 2727(d), which authorizes appropriations for "capital expenses" incurred by LEAs throughout the nation in providing equitable Chapter 1 services to private school students. Capital expenses are expenditures for noninstructional goods and services required to comply with *Aguilar*. (34 C.F.R. § 200.57(a)(2).)

94. In addition, beginning in the 1990-91 school year, the Board has been able to use approximately 15.2 million dollars in "carryover" funds to cover some of its *Aguilar* compliance costs. Carryover funds are unspent funds from prior years. These carryover funds were all originally allocated for private school students, and accrued during the early years following the judgment, because the number of participating private school students decreased dramatically during those years.

95. State funds allocated pursuant to Chapter 53, federal capital expense funds allocated pursuant to section 2727(d) and the carryover funds, have been sufficient to cover most, but not all of the Board's expenditures for compliance with the judgment. (In two years these funding sources did cover all compliance costs.) The excess expenditures (the $7,920,528 referred to above) were taken "off the top" of the Board's total Chapter 1 allocation.

96. Regulations promulgated by the United States Department of Education require that an LEA generally take the noninstructional administrative costs of providing Chapter 1 services "off the top" of the LEA's entire Chapter 1 allocation, rather than charging such costs solely to the group of students for whom they were incurred. (34 C.F.R. § 200.52(a)(2).)

97. This off-the-top policy, which was established by the United States Department of Education prior to the *Aguilar* decision, applies to the noninstructional administrative costs of delivering Chapter 1 services to all participating students (whether they attend public or private, including non-sectarian, school).

98. Following the *Aguilar* decision, the United States Department of Education stated, in its August 1985 written Guidance, that the "off-the-top" policy should also be applied to the noninstructional costs of complying with *Aguilar*. (Exhibit "5" annexed hereto, p. 6, question 15.) This directive was later promulgated as a regulation. (34 C.F.R. § 200.52(a)(2).)

99. Although the necessity of taking funds off the top of the entire Chapter 1 allocation to meet the costs of complying with the judgment has been comparatively limited in the past, the situation will be very different in the near future.

100. New York State Chapter 53 funding ended after the 1990-91 school year and the national federal appropriation for capital expense funds, pursuant to section 2727(d), is likely to be reduced by approximately 50% for school year 1996-97. (In 1994-95, the appropriation was 41 million dollars; the United States Department of Education

has requested that Congress appropriate only 20.5 million dollars for 1996-97.) It can be anticipated that New York City's share of the reduced national appropriation for capital expenses will also be substantially reduced.

101. In addition, the 15.2 million dollars in carryover funds which were used for compliance costs will be exhausted by the end of the 1994-1995 school year. Given this elimination and reduction of funding sources for compliance costs, if the annual costs of compliance with the judgment continue at roughly the current rate of approximately 15 million dollars, then in school year 1995-96, the Board may be forced to take approximately 5 million dollars off the top of the total Chapter 1 allocation simply for compliance costs, and beginning in school year 1996-97, the Board may be forced to take approximately 10 million dollars annually off the top of the total Chapter 1 allocation simply for compliance costs. As explained above, this is money which would otherwise be used to provide additional instructional and support services to both public and private schoolchildren.

Specific Expenditures for Compliance with the Judgment

102. Expenditures for compliance with the judgment were made in four categories: shuttle transportation between the private schools and the public school and leased sites; the leasing of MIUs; the leasing of leased sites and administrative expenditures for CAI.

103. During the school years 1986-87 through 1993-1994, total expenditures in the four categories were: $279,877 for the (identifiable) costs of shuttle transportation; $83,729,440 for MIUs; $1,596,095 for leased sites and $1,625,487 for the administrative costs of CAI.

104. Again, for ease of comprehension, the expenditures made in these four categories are listed in the annexed Chart B. (The information set forth in Chart B is incorporated, as if fully set forth, herein.) The figures in Chart B indicating the amount spent in various categories (e.g., MIUs, leased sites, etc.), show the actual expenditures for items in these categories; they do not include the "indirect cost" figure added to all Chapter 1 expenditures (except for purchases of equipment) to generate funds to cover general administrative overhead. Pursuant to New York State Education Department directives, for federal funds the indirect cost figure was 6.5% of the expenditure and for state funds the indirect cost figure was 5% of the expenditure. The indirect cost expenditures are described further below.

105. To set these very significant expenditures in an appropriate perspective, the total expenditures for the Chapter 1 program in New York City for all public and private (including non-sectarian) school students are listed in the annexed Chart C. (The information set forth in Chart C is incorporated, as if fully set forth, herein). During 1986-87, the total expenditure for the Chapter 1 program in New York City, for both public and private (including non-sectarian) school students was $190,146,061. During the intervening years, Congress appropriated additional funding for Chapter 1, and accordingly, the Chapter 1 allocation for New York City has increased. During 1993-94, total expenditures for the Chapter 1 program in New York City, for both public and private school students was $425,440,299.

Shuttle Transportation

106. The Board of Education does not maintain

records which distinguish expenditures for shuttle transportation between the private schools and public school sites, from expenditures for transportation between the private schools and leased sites.

107. Further, pursuant to reporting requirements of the New York State Department of Education, a portion of the Board's costs of transporting private school students between public school sites and leased sites during the school years 1988-89, 1989-90, and 1990-91 were aggregated with other costs. The Board's expenditures for shuttle costs, as listed in this Declaration and in the annexed Chart B, are the identifiable expenditures.

MIUs

108. During the school years 1986-87 through 1993-94, the Board of Education paid an annual rental of $106,934 per MIU, which covered the use of each MIU for a 6 hour and 20 minute school day, and included the costs of the driver, garage, insurance, maintenance, and repairs. The Board has the option of using one or more of the MIUs for an additional two hours per day at a cost of $75 per hour for each MIU, and has exercised this option for a varying number of MIUs over the years.

CAI

109. Under regulations promulgated by the United States Department of Education, expenditures for computers used for CAI (as well as expenditures for CAI technicians) have been considered instructional expenditures and therefore have been charged entirely to funds allocated for private school students. (34 C. F. R. § 200.57(a)(2)(ii.).) These expenditures were not paid for by funds provided under

Chapter 53 or section 2727(d), since those funds are reserved for noninstructional administrative expenditures. Similarly, these expenditures were not taken off-the-top of the entire Chapter 1 allocation, since that procedure is also reserved for noninstructional administrative expenditures. There are, however, some noninstructional administrative expenditures for CAI. These are for central office expenses, such as the salaries of central office personnel who worked with CAI.

Regular Noninstructional Administrative Costs

110. There are, of course, also general noninstructional administrative expenditures for operating the Chapter 1 program in New York City for both public and private school students. These expenditures have nothing to do with compliance with the judgment; they are simply the usual expenditures for administrative overhead, such as central office expenses.

111. In accordance with the terminology and practice adopted by the New York State Education Department, which audits, monitors and supervises the Board of Education's Chapter 1 program, the Board uses the term "indirect costs" to refer to the general administrative overhead costs.

112. A ceiling for indirect costs, expressed as a percentage of total expenditures (excluding purchases of equipment) is established annually by the New York State Education Department (which prohibits any assessment of indirect costs against purchases of equipment.)

113. The indirect cost rate for the Board of

Education during the years 1986-87 through 1993-94 was 6.5% for federal funds used in the Chapter 1 program. For the State funds provided under Chapter 53, the indirect cost rate was 5%. For recordkeeping purposes, the Board computes the indirect costs by adding a uniform 6.5% administrative charge to each component of its federal Chapter 1 budget, except purchases of equipment, which is effectively the same as deducting general administrative expenditures before breaking the budget into its various components, and implements the federal regulatory command that the noninstructional administrative costs of serving both public and private school students be charged to an LEA's total Chapter 1 funds. (34 C.F.R. § 200.52(a)(2)). For the State Chapter 53 funds, the Board added a uniform 5% administrative charge to each component of the budget funded by Chapter 53, except expenditures for equipment.

Generally Applicable Provisions of the Chapter 1 Program for Private School Students

114. The teachers and other personnel who provide Chapter 1 services to private school students in New York City are Board of Education employees. They are hired and assigned by the Board without regard to their religious affiliation, gender, race, national origin, or whether they speak languages other than English.

115. The union which represents all teachers, guidance counselors, school social workers and school psychologists employed by the Board of Education is the United Federation of Teachers ("the UFT"). These employees are assigned to union chapters, based on their work assignment. The employees in these four job titles who serve private school students in the Chapter 1 program are assigned to the "Nonpublic School Chapter" of the UFT.

I am informed, based on information provided by the UFT, that over 60% of these professional employees are of a different religious affiliation than the religious affiliation of the private schools whose students they serve.

116. This figure is consistent with the Board's own information and experience. As discussed below, approximately 86% of the private school students in the Chapter 1 program attend schools affiliated with the Roman Catholic Church. Although the Board does not ask its employees their religious affiliation, it is widely-known that a high proportion of the professional staff employed by the Board is of the Jewish faith. I am informed that it is for this reason that the public schools in New York City are closed during major Jewish holidays, whereas offices throughout New York City government remain open. Given the high proportion of Jewish staff, there has always been a concern that there would be an insufficient number of employees in attendance on major Jewish holidays to adequately staff the public schools. There is no reason to believe that the staff assigned to the Chapter 1 nonpublic school program is of a significantly different religious composition than the Board's staff in general.

117. In school year 1990-91, approximately 86% of the private school students in the Chapter 1 program attended Roman Catholic schools and approximately 8% attended Hebrew Day schools. The remaining 6% of the students attended schools that were Greek Orthodox, Lutheran, Episcopal, Ukrainian Orthodox, other denominational, or nonsectarian. These figures were not markedly different during the years 1986-87 through 1993-94.

118. My Bureau's written guidelines for our

employees provide them with instructions for carrying out their duties under the unique circumstances resulting from the judgment. The instructions are issued and distributed annually, and are designed to preserve the secular nature of the Chapter 1 program for private school students and to provide instructions concerning other matters which arise in light of the itinerant and other unusual conditions in which most of our staff perform their duties. (Copies of the guidelines for professional staff assigned to neutral (i.e., leased) sites, MIUs and CAI, and of the administrative procedures for CAI technicians, are annexed hereto as Exhibit "10".)

119. The Board of Education's collective bargaining agreement with the United Federation of Teachers, provides that every tenured professional employee receives one announced visit by a Board supervisor each year for purposes of a formal observation and evaluation. Every non-tenured professional employee receives three such announced visits per year. The same requirements govern all professional employees who work for the Board. In addition, Board supervisors make a number of unannounced visits to the Chapter 1 personnel who serve private school students. The total number of both announced and unannounced supervisory visits to each professional employee is approximately ten per school year.

120. Although, as discussed above, the Board's staff consult with the private school staff to achieve effective coordination of the Chapter 1 and regular school curricula, it is the Board's staff which determines the content and methodology of the instruction and clinical and guidance services provided through Chapter 1 to the private school students. The private school staff cannot dictate the content of instruction, or the methodology used to provide these

services.

Dated: Brooklyn, New York
October 16, 1995

[Margaret O. Weiss]
MARGARET O. WEISS

CHART A

EXPENDITURES FOR COMPLIANCE WITH JUDGMENT

BY FUNDING SOURCE AND SCHOOL YEAR

School Year	State funds Chapter 53	Fed. funds § 2727(d)	Fed. funds Off the Top	Carryover funds	Total
1986-87	$ 7,506,[illegible]	N.A.	$ 169,701	N.A.	$ 7,676,501
1987-88	$ 7,484,000	N.A.	$ 954,867	N.A.	$ 8,438,867
1988-89	$ 8,600,000	N.A.	$ 297,221	N.A.	$ 8,897,221
1989-90	$ 8,507,618	$ 1,927,585	None	N.A.	$10,435,203
1990-91	$ 8,250,098	$ 3,291,362	None	$ 1,016,462	$12,557,922
1991-92	N.A.	$ 7,724,044	$ 3,562,720	$ 3,806,097	$15,092,861
1992-93	N.A.	$ 9,028,082	$ 1,823,682	$ 4,216,335	$15,068,099
1993-94	N.A.	$ 9,750,078	$ 1,112,337	$ 4,216,335	$15,078,750
TOTAL	$40,348,516	$31,721,151	$ 7,920,528	$13,255,229	$93,245,424

Notes

N.A. means Not Applicable

State funding under Section 9 of Chapter 683 of the Laws (of New York) of 1986, providing for apportionment of funds allocated under Chapter 53 of the Laws of New York (the local assistance budget) was not continued after the 1990-91 school year.

Federal funding for capital expenses under 20 U.S.C. § 2727(d) was received beginning in the 1989-90 school year following the enactment of § 2727(d) in 1988.

The carryover funds, which were unused funds from the private school (including non-sectarian) students' allocation were released by the U.S. Department of Education for compliance expenditures in June 1990.

Pursuant to New York State Department of Education guidelines, the state Chapter 53 funds include a 5% indirect cost charge for all expenditures except equipment.

The other funding sources are all federal funds, and pursuant to New York State Department of Education guidelines, include a 6.5% indirect cost charge for all expenditures except equipment.

CHART B

EXPENDITURES FOR COMPLIANCE WITH JUDGMENT

BY TYPE OF EXPENDITURE AND SCHOOL YEAR

School Year	MIU Costs	Leased Site Costs	CAI Administrative Costs	Shuttle Transportation Costs	Total
1986-87	$ 7,149,333	$ 135,532	N.A.	$ 26,630	$ 7,311,495
1987-88	$ 7,335,877	$ 387,963	$ 88,731	$ 104,531	$ 7,917,102
1988-89	$ 7,549,249	$ 279,082	$ 273,032	$ 25,248	$ 8,126,611
1989-90	$ 9,157,444	$ 198,508	$ 348,942	$ 31,329	$ 9,736,223
1990-91	$11,126,541	$ 280,402	$ 225,711	$ 28,211	$11,660,865
1991-92	$13,790,999	$ 151,832	$ 205,801	$ 23,068	$14,171,700
1992-93	$13,810,752	$ 75,106	$ 237,922	$ 24,672	$14,148,452
1993-94	$13,809,245	$ 87,670	$ 245,348	$ 16,188	$14,158,451
TOTAL	$83,729,440	$ 1,596,095	$1,625,487	$ 279,877	$87,230,899

Notes -

N.A. means Not Applicable

The dollar figures above are actual expenditures - they do not include the indirect cost additions (5% for state funds and 6.5% for federal funds except for equipment) which were included in the figures in Chart A

Shuttle Transportation Costs are not complete after the 1987-88 school year, because pursuant to New York State Education Department reporting requirements, some of these costs were aggregated with the costs of MIUs. The shuttle transportation costs presented for school year 1988-89 and for the following years, represents the identificable costs of shuttle transportation costs; the balance of these costs are included in the total MIU costs.

CAI Costs - These expenditures are only for administrative expenses, such as salaries and equipment for central office administrative personnel who work on CAI. Pursuant to federal regulation 34 C.F.R. § 200.57(a)(2)(ii), expenditures for computers and software used for CAI, as well as the salaries of the CAI technicians, have been considered instructional expenditures. These expenditures have therefore been charged solely to Chapter 1 funds allocated for private school students, and are not included in the above table.

CHART C

TOTAL EXPENDITURES FOR CHAPTER 1 PROGRAM IN NEW YORK CITY FOR BOTH PUBLIC AND PRIVATE SCHOOL STUDENTS

BY SCHOOL YEAR

SCHOOL YEAR	TOTAL EXPENDITURES
1986-1987	$ 190,146,061
1987-1988	$ 197,657,498
1988-1989	$ 257,512,021
1989-1990	$ 327,733,794
1990-1991	$ 363,065,833
1991-1992	$ 382,904,292
1992-1993	$ 419,182,808
1993-1994	$ 425,440,299
TOTAL	$ 2,563,642,606

Note

These total figures include the expenditures for all Chapter 1 services provided to both public and private (including non-sectarian) school students, whether centrally, by the Chancellor, or by the community school districts.

SUBSTITUTE RESOLUTION
June 7, 1995 Calendar,
Item LO-1

AUTHORIZATION TO COMMENCE LEGAL PROCEEDINGS TO SEEK RELIEF FROM THE JUDGMENT IN AGUILAR v. FELTON

The following resolution is presented for adoption:

WHEREAS, for twenty years prior to 1986, the Board of Education provided required remedial educational and support services to economically and educationally disadvantaged students attending nonpublic religious schools on the premises of their religious schools in accordance with Chapter 1 of the Elementary and Secondary Education Act; and

WHEREAS, by decision dated July 1, 1985, in *Aguilar v. Felton*, 473 U.S. 402 (1985), the United States Supreme Court (by a vote of five for, and four opposed) held that it was a violation of the Establishment Clause of the First Amendment to the United States Constitution to have public school teachers and support staff provide such services on the premises of religious schools; and

WHEREAS, in response to such decision, the Board of Education thereafter developed an alternative program for providing the required Chapter 1 services to economically and educationally disadvantaged students attending nonpublic religious schools, which program includes the providing of services in leased mobile instructional units, in leased neutral sites, in public schools (which space is very limited), and through a system of interactive computer technology called

computer assisted instruction; and

WHEREAS, the delivery of such services by these alternative methods has proven to be very expensive (for example, the annual leasing cost for each mobile instructional unit (which includes the services of a driver, garaging, maintenance repairs, insurance) is $106,934; the total current annual cost for leasing 126 units is $13,473,684; and the total annual cost for leasing 10 neutral sites which are presently used is $105,624) thereby significantly reducing the limited funds now available for providing needed Chapter 1 remedial services to both public school students and nonpublic school students; and

WHEREAS, since federal regulations require that non-instructional administrative costs for providing Chapter 1 services be taken "off the top" of the Board's total Chapter 1 allocation from the federal government (34 C.F.R. §200.52 (a)(2)), Chapter 1 funds may therefore only be divided between public and private school students after these administrative expenses are deducted; and

WHEREAS, anticipated reductions in available funding to cover these service delivery costs means that in the future additional scarce resources will have to be diverted from providing needed remedial and support services to both public and nonpublic school students to cover these service delivery costs; and

WHEREAS, the Board of Education and the Chancellor also believe that it is educationally preferable to provide remedial and support services on the premises of students' regular schools, as is done for public school students, in that:

1) the use of mobile instructional units, neutral sites, and public school sites involves the loss of much needed regular classroom instructional time for Chapter 1 students because of the time used to travel to offsite premises;

2) in the case of computer assisted instruction, there is no simultaneous face-to-face instruction by a teacher to support and reinforce the computerized instruction; and

3) entitled Chapter 1 economically and educationally disadvantaged students in religious schools who are all performing below grade level in one or more subjects can ill afford such instructional time loss or other factors which negatively affect the delivery of services; and

WHEREAS, in 1994, in the United States Supreme Court's decision in *Board of Education of Kiryas Joel School District v. Grumet*, 114 S.Ct. 2481 (1994), a majority of the Justices indicated that the Supreme Court should overrule or reconsider *Aguilar v. Felton*, *supra*; now, therefore, be it

RESOLVED, that in light of the significant costs associated with the alternative service delivery methods now used which divert scarce funds from the provision of remedial services to both public and nonpublic school students, the educational superiority of on-premise services, and the opinion of several United States Supreme Court Justices that *Aguilar v. Felton* should be revisited, the Board of Education hereby authorizes the Corporation Counsel of the City of New York to take those steps necessary to, commence legal

proceedings, as soon as possible, seeking relief from the judgment in *Aguilar v. Felton* and, if necessary, reconsideration and overruling of the Supreme Court's holding in *Aguilar v. Felton*.

EXPLANATION

Chapter 1 requires the Board of Education to provide remedial and support services to eligible students attending nonpublic religious schools.

The Board of Education provided effective remedial and support services to Chapter 1 economically and educationally disadvantaged eligible students on the premises of their nonpublic religious schools for twenty (20) years, without any proven evidence of entanglement between the religious school and the public school system; classrooms, materials, and staff were maintained separate and distinct from the educational program provided by the religious school.

Given that significant funds are required to be expended on the alternative methods now necessary because of the *Aguilar v. Felton* decision, thereby diverting scarce resources from eligible public and nonpublic school students, as well as the loss of instructional time of students attending nonpublic religious schools, the Board and Chancellor believe it necessary to seek relief from the judgment in *Aguilar v. Felton*. Given the views expressed by a majority of the Justices in the *Kiryas Joel* case, there is a serious question whether *Aguilar v. Felton* commands the continuing support of a majority of the Court.

The Board and the Chancellor believe that the Chapter 1 program in New York City presents a proper and compelling case for the reconsideration of Aguilar v. Felton. Indeed,

the Board and Chancellor believe it would be irresponsible in this time of national, state, and city fiscal crises not to take such action so as to ensure the best uses of scarce and diminishing educational resources.

A TRUE COPY OF RESOLUTIONS ADOPTED BY
THE BOARD OF EDUCATION ON JUNE 7, 1995

SECRETARY, BOARD OF EDUCATION

THE STATE EDUCATION DEPARTMENT/THE
UNIVERSITY OF THE STATE OF NEW
YORK/ALBANY, N.Y. 12234

President of the University
and Commissioner of Education
The New York State Education Department
Albany, New York 12234

July 12, 1985

Dear Secretary Bennett:

The July 1 decision of the United State Supreme Court in *Aguilar v. Felton* has, as you well know, presented state and local education agencies throughout the Nation with an extraordinarily difficult and complex task.

The delivery by school districts in this State of special educational services to educationally deprived, low income children who attend nonpublic schools, in accordance with ECIA Chapter 1, has been accomplished almost exclusively, since the initiation of the program in 1965, through the presence of public school teachers in nonpublic school buildings. Entirely apart from the question of the educational adequacy of any other method of service delivery, the identification and implementation of alternatives would involve a process which cannot possibly be completed before the commencement of the 1985-86 school year. As of today, barely eight weeks remain before the opening of schools in September.

Apart from the logistical problems of acquiring and readying alternative instructional space, whether fixed or mobile, and of rearranging the assignments of both students and teachers, the typical school is faced with the fact that most staff are 10-month employees, and are not available during the months of July and August to design and construct alternative arrangements.

In sum, it would be utterly impossible for State education agencies and local education agencies to comply with their statutory responsibilities under ECIA Chapter 1, under the strictures imposed by the Supreme Court, by the opening of school in September, 1985, or indeed within several months thereafter.

And as you are well aware, State agencies may not approve the applications of local education agencies for Chapter 1 funds to be used in the public schools unless those applications include provisions for the delivery of services to students in nonpublic schools which comply with Chapter 1 and the implementing regulations. As a result, it is not only the best interests of eligible youngsters in nonpublic schools which are at stake, but indeed the interests of all educationally deprived, low income youngsters attending both-public and nonpublic schools.

It is therefore my urgent request that you, as a party to *Aguilar v. Felton*, and on behalf of all of the school districts in the Nation, request your attorney in that case to make application to the appropriate Court for a continued stay of the mandate of the District Court during the 1985-86 school year, in order to afford both local education agencies and State education agencies adequate time to develop and implement, in consultation with nonpublic school officials, orderly methods of delivery of Chapter 1 services to educa-

tionally disadvantaged, low income students who attend nonpublic schools.

I suggest that such a stay extend for the entire 1985-86 school year because I am convinced that a major change in the service delivery system will be more difficult to implement during the course of a given school year than at the commencement of a new year, but more importantly because I believe strongly that a substantial change in mid-year will not be in the best educational interests of the affected youngsters.

Needless to say, it will be most helpful if you will inform me and other chief state school officers of your decision as promptly as possible.

Sincerely,

Gordon M. Ambach

Hon. William J. Bennett
Secretary of Education
United States Department of Education
FOB 6, Room 4181
400 Maryland Avenue, S.W.
Washington, D.C. 20202

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

GUIDANCE ON AGUILAR v. FELTON AND CHAPTER 1 OF THE EDUCATION CONSOLIDATION AND IMPROVEMENT ACT (ECIA) QUESTIONS AND ANSWERS

August 1985

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1. Question: May Chapter 1 instructional services be provided to private school students on the premises of religiously-affiliated private schools?

   Answer: No. In *Aguilar v. Felton*, the Supreme Court held that Chapter 1 instructional services may not be provided on the premises of religiously affiliated private schools. Instructional services for those children must be provided at sites that are neither "physically nor educationally identified with the functions of the private school." *See Wolman v. Walter*, 433 U.S. 229, 246-47 (1977).

2. Question: Are Chapter 1 programs on nonreligious private school premises affected by the *Aguilar v. Felton* decision?

   Answer: No.

3. Question: Does the term "teacher" as used in *Aguilar v. Felton* include other public school personnel?

   Answer: The Second Circuit opinion affirmed by the Supreme Court in *Aguilar v. Felton* forbade "the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise, or to provide clinical and guidance services." However, the Supreme Court in an earlier case, *Wolman v. Walter*, distinguished the role of the diagnostician from that of the teacher or counselor with regard to services in the private school. We view testing to select children as part of diagnosis; hence, on-premises testing for

student selection is not prohibited under *Aguilar*.

4. Question: If a local educational agency's (LEA) application does not provide for equitable services to private school children, may a State educational agency (SEA) approve it?

   Answer: No. Furthermore, the LEA has no authority to expend funds until the SEA approves the application.

5. Question: How are services to private school children to be monitored by the LEA and SEA?

   Answer: The LEA and the SEA must monitor services for private school students in the same way they monitor services to public school children. In addition, the SEA must ensure that equitable services are provided to private school students.

6. Question: Can private school students receive services in public schools or at neutral sites during regular school hours? Before or after school or on weekends?

   Answer: Yes. These options are all available, but the services must be equitable to services provided public school children.

7. Question: Can private school children receive Chapter 1 services in the private school before or after regular school hours or on weekends?

   Answer: No.

8. Question: Can private school children receive services with public school children in a summer school program?

   Answer: Yes, but services must be equitable to those provided public school children. To provide only summer activity for private school children, while serving public school children during both the regular term and summer, would not be equitable.

9. Question: Where may summer school services be provided?

   Answer: At any site allowable during the regular school year.

10. Question: Has the LEA and SEA responsibility for providing services on an equitable basis to eligible private school children been changed?

    Answer: No, it was not changed by the Court's decision.

11. Question: Who is responsible for planning and implementing the Chapter 1 program for private school children?

    Answer: An LEA must plan to provide Chapter 1 services to private school children "in consultation with private school officials." However, the decision as to what to propose in its application rests with the LEA and the decision as to what to approve rests with the SEA.

12. Question: What criteria should an LEA and SEA

consider to determine equitability?

Answer: First of all, the public and private school children must be considered as participating in the same project, not different projects--for which those children, all at certain grade levels, are selected on the basis of similar measures of educational need. The "equity" of services for private school children can be assessed only by comparing those services to those provided for public school children. The services may be considered equitable if--

a. The LEA assesses, addresses, and evaluates the private school children's specific needs and their educational progress on the same basis as public school-children.

b. The LEA provides, in the aggregate, about the same amount of instructional time and materials for each private school child as compared with each public school child.

c. The instructional services cost about the same. Section 557(a) of Chapter 1 of ECIA requires "equal" expenditures for private and public school students. Thus, the cost per eligible child must be considered in determining equitability. However, cost is not the sole means of determining equitability.

d. The private school child has an opportunity to participate equitable to the opportunity of a public school child. In one school district the opportunity may be at another site during the school day. In another, it may be outside of regular school hours. Any alternative must be evaluated in the light of local

conditions. Other factors should be considered, including the level of educational service, the age of the children to be served, the time lost in travel, availability of transportation, distance, weather, supervision, safety, and the opportunity for and the rate of participation.

13. Question: May an LEA revise its program for public school students so that it is equitable with that for private school students?

Answer: Yes. In some cases it may be necessary to adjust the manner in which services are provided to public school students.

14. Question: May Chapter 1 pay for the rental of facilities, the cost of arranging for such space, the costs of transporting private school pupils, or the costs of transporting private school pupils from home to the Chapter 1 services?

Answer: All of the above are allowable Chapter 1 costs.

15. Question: If providing off-premises services requires additional costs, such as those for transportation, space, or administration, do they come from the LEA's whole Chapter 1 allocation or from that part of the LEA'S Chapter 1 allocation which would normally go to serve private school students?

Answer: These additional costs would come from the LEA's whole allocation, so that Chapter 1 instructional services may be provided on an equitable basis to both public and private school

children.

16. Question: Where an LEA provides Chapter 1 services to nonpublic school children in the public schools, may the LEA charge Chapter 1 a reasonable amount for the space used? How are such costs allocated?

Answer: Yes. Reasonable and necessary costs for public school space for the instruction of nonpublic school students are allowable. Reasonable and necessary costs are those in excess of what the LEA would incur in the absence of Chapter 1. For example, the cost of a classroom in a building already in use would not be an excess cost. Special costs incurred in preparing and maintaining it for occupancy by Chapter 1 would be allowable.

Any such costs would be considered administrative and would come from the LEA's whole Chapter 1 allocation--not the portion which is for instructional services to private school children.

17. Question: May a private school child take onto private school premises Chapter 1 instructional materials for his or her use as part of the child's Chapter 1 program?

Answer: Yes.

18. Question: Can a neutral third-party contractor provide instructional services on the premises of a religiously-affiliated private school?

Answer: No.

19. Question: On what basis can a bypass be requested?

Answer: Section 557(b) of the Chapter 1 statute and Section 200.80 of the regulations state that if an LEA is prohibited by law from providing or the Secretary determines that the LEA has substantially failed to provide Chapter 1 services to private school children, he can waive the requirement of the LEA and, instead, arrange for the provision of such services. A representative of a private school child can register a complaint with the Department that an LEA has substantially failed to provide Chapter 1 services; an LEA or SEA can voluntarily notify the Department that the LEA is prohibited from or unable to provide such services; or the Department through its monitoring function can determine that an LEA failed to provide services.

20. Question: If private school officials consider the Chapter 1 program offered by the LEA to be inequitable, what can they do?

Answer: They may complain to the LEA. If no satisfactory action is taken, they may complain to the SEA. If still no satisfactory, action is taken, they may complain to the Secretary. If appropriate, the Secretary takes the steps necessary to invoke a bypass.

21. Question: What are the steps leading to a Chapter 1 bypass?

Answer: After a complaint is received by the Secretary and an investigation finds that an LEA has substantially failed to provide services on an

equitable basis to private school children, the Secretary informs the LEA and SEA that a bypass will be invoked. The number of subsequent steps and amount of time necessary to provide services with a bypass varies according to the extent to which at LEA or SEA wishes to appeal. The specific steps are to be found in Section 557(b) of Chapter 1 and in Sections 200.80-85 of the regulations.

22. Question: Where do funds for a bypass come from?

Answer: Funds are deducted from the allocation of the LEA. In computing the amount to be deducted, administrative costs, for both the public and private school programs, are calculated and deducted from the allocation. Remaining funds are allocated for public and private school children to ensure that educational services are equitable. Any increased administrative costs attributable to the bypass, therefore, are shared by both the public and private school children. The Department will ensure that services are provided in the most cost effective manner.

23. Question: Did *Aguilar v. Felton* specifically forbid instructional services provided to children in neglected or delinquent institutions operated by religious groups?

Answer: No. The Court did not address the unique circumstances involved in serving children in neglected or delinquent institutions.

THE STATE EDUCATION DEPARTMENT/THE UNIVERSITY OF THE STATE OF NEW YORK/ALBANY, N.Y. 12234

July 22, 1985

TO: District Superintendents, Superintendents of Schools, Nonpublic School Administrators and School District Attorneys

PROM: Robert D. Stone

SUBJECT: ECIA Chapter 1 Services to students attending nonpublic schools

On July 1, 1985, the United States Supreme Court ruled in two separate cases that public funds may not be used to pay public school teachers to provide instruction to students on the premises of sectarian nonpublic schools.

The decision of greater import for both public and nonpublic school authorities both in New York and throughout the Nation held that the administration of the Title I (now Chapter 1) program in New York City violates the Establishment Clause of the Federal Constitution because the supervision and monitoring of the work of publicly paid teachers in providing instruction to meet the needs of educationally deprived children from low-income families, and the necessary consultation and cooperation between public and nonpublic school officials, results in "excessive entanglement" between State and church (*Aguilar v. Felton*).

In a related case involving programs of the Grand

Rapids, Michigan school system, the Court found two locally funded programs invalid under the Establishment Clause (*School District of the City of Grand Rapids v. Ball*). One program was offered in nonpublic schools after the regular school day, and included a variety of courses which were clearly not religion-oriented. The program was voluntary, and the teachers were part-time, public school employees who for the most part, the Court found, were otherwise employed full-time by the same nonpublic school in which the community education classes were held.

The other program offered classes during the regular school day that were intended to supplement the "core curriculum" courses required by the State of Michigan.

The Supreme Court held that both programs had the primary effect of advancing religion, and were therefore unconstitutional. The majority of the Court said that the programs impermissibly promoted religion in three ways. First, the State-paid teachers involved in the programs might be influenced by the "pervasively sectarian" nature of the religious schools in which they work, and might subtly or overtly indoctrinate the students in particular religious tenets at public expense. Second, the "symbolic union of church and state" inherent in the provision of secular State provided public instruction in religious school buildings tends to convey a message of state support for religion to students and to the general public. Third, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.

It is important to understand the bases for the holdings of the majority of the Supreme Court in both cases because the reasoning may well be relevant to alternative

methods which may be considered for delivering Chapter 1 services to students enrolled in nonpublic schools. Copies of the opinions in both cases are annexed as Attachments A and B.

The critical questions now faced by local school authorities and State education agencies throughout the Nation are what alternative methods of delivery of Chapter 1 services to eligible educationally disadvantaged children in sectarian nonpublic schools are now permissible and when such alternatives must be implemented.

With respect to timing, it is clear that the identification and implementation of alternatives in a responsible way will require more time than is available prior to the beginning of school in September of this year. For that reason, Commissioner Ambach has transmitted the attached letter to Secretary of Education William J. Bennett (Attachment C), urging him - as a party to *Aguilar v. Felton* - to make application to the appropriate Court, on behalf of all school districts in the Nation, for a stay of the effect of the Supreme Court decision for a period sufficient to afford local school authorities and State education agencies sufficient time, in consultation with nonpublic school authorities, to develop and implement effective methods of delivery of Chapter 1 services to students enrolled in nonpublic schools.

Because there is no assurance that such a stay will be granted, it is essential that local school authorities, State education agencies and the United States Department of Education, in consultation with nonpublic school authorities, proceed immediately to consider alternative methods of providing Chapter 1 services. Consultation with nonpublic schools is essential in the entire planning process. Local

school officials should discuss proposed programs as well as possible means and sites for delivery of services with nonpublic school officials as plans are developed.

Immediately upon learning of the Supreme Court decisions, this Department contacted officials of the Department of Education for information as to the position and plans of that agency. While no definitive advice has yet been provided to us, we are informed that a meeting of State directors of Chapter 1 services has been scheduled for August 1 in Washington, and that in the meantime the Department of Education invites questions concerning any aspect of the problem. All school authorities in New York are invited to submit any questions they may have, through the chief school officer (superintendent of schools or chief administrator of a nonpublic school) to Assistant Commissioner Maria Ramirez, Office for General Education, Education Building Addition, Albany, New York 12234.

With respect to the three-year unified compensatory education plan which school districts are required to submit to the State Education Department, each school district should do one of the following:

- Those school districts which have no eligible students enrolled in sectarian nonpublic schools should complete and submit to the State Education Department their three-year comprehensive compensatory education plans as soon as possible.

- Those school districts which are required to provide Chapter 1 services to eligible students enrolled in sectarian nonpublic schools and which have developed alternative means of doing so consistent with the recent Supreme Court decisions, should

complete and submit to the State Education Department their three-year comprehensive compensatory education plan as soon as possible. The plan must contain a clear and precise description of how and where services will be provided to eligible nonpublic school students and the specific costs involved.

•Those districts which are required to provide Chapter 1 services to eligible students enrolled in sectarian nonpublic schools but have not yet developed effective and legally permissible methods of doing so should submit to the State Education Department a three-year comprehensive compensatory education plan that is complete except for information pertaining to the delivery of Chapter 1 services to eligible students enrolled in sectarian nonpublic schools. Because school district plans for providing Chapter 1 services must specify how services will be delivered to both public and nonpublic school students, the State Education Department cannot give final approval to any Chapter 1 application unless it contains provision for the delivery of services, consistent with the recent U.S. Supreme Court rulings, to eligible students in nonpublic schools. Once districts have received guidance on acceptable programs, their Comprehensive Plans must be revised to include services to eligible nonpublic school students affected by the Supreme Court's decision.

Following the meeting of State directors of Chapter 1 services in Washington on August 1, and the issuance of more definitive information by the U.S. Department on the question of Chapter 1 services to nonpublic school students,

the State Education Department will provide additional guidance on possible alternative methods of delivering services to students enrolled in nonpublic schools.

In the meantime, it is possible now to address some questions of Federal and State law which relate to possible alternative methods of delivering service to students enrolled in nonpublic schools:

Neutral sites: The offering of classes at religiously neutral sites (i.e. locations not under the control of any religious authority or organization) seems clearly to be permissible.

Mobile units: The use of vans or other forms of portable facility appears to be legally unobjectionable, provided such units are not located on premises under the control of a sectarian nonpublic school or other religious organization.

Public School Premises: The use of public school buildings for the instruction of students enrolled in nonpublic schools presents a more difficult question. It has long been recognized that public school districts in New York are not authorized to admit to their classes students who are enrolled in nonpublic schools, except where there is express statutory authority, such as the "dual enrollment" authority provided by Education Law section 3602-c. The dual enrollment under that section is limited to programs in occupational and vocational education, special education and instruction for the gifted.

However, a careful review of the issue has led us to the conclusion that the requisite statutory authority in the

case of Chapter 1 programs can be found in Chapter 1 itself, and that school districts in New York State are authorized to provide, on public school premises, services under Chapter 1 for eligible educationally disadvantaged youngsters in sectarian nonpublic schools. It should be noted in this regard that the admission of youngsters enrolled in nonpublic schools to Chapter 1 classes in public school buildings should not be considered to be "dual enrollment," within the meaning of Education Law section 3602-c.

Instructional technology: The question whether the use of such techniques as interactive television or other instructional technology is legally permissible under the Supreme Court decisions will not be addressed in this memorandum. However, we shall pursue those possibilities in consultation with the United States Department of Education and Federal legal authorities, and will provide local school authorities with whatever guidance may result from those discussions.

Non-instructional expenses: The question whether and how such noninstructional costs as the purchase or rental of instructional sites, and the transportation of nonpublic students between their schools and such sites, can be defrayed with Chapter 1 funds is likewise a question we shall pursue with Federal authorities.

In addition to our close liaison with Federal authorities and with New York City school authorities and their legal advisors, Commissioner Ambach conducted a meeting on July 11 with representatives of both the public school and nonpublic school communities, and is designating a smaller working group representing those interests to assist

him in pursuing the various Chapter 1 issues. We shall of course keep all school districts and nonpublic schools advised as to the results of those efforts.

ALAN G. HEVESI
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EXECUTIVE SUMMARY

New York City schools are severely overcrowded and the problem will probably get substantially worse over the next decade. In 1993, school enrollment was 1,015,758, the highest level in 15 years. The school system is adding the equivalent of an entire school district, more than 21,000 students, every year. This growth is expected to continue steadily into the next century, primarily due to immigration and the high number of births. By 2002, the Board of Education estimates that school enrollment will total 1,256,400, an increase of 240,642 from 1993.[1]

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[1]1993 is the last year data is available. Throughout the report the ten year projection period 1993 to 2002 is used.

The City does not have the resources to build enough new schools to meet the need for new space and must actively pursue alternatives. Of the current student population, approximately 90,000 students, or 9%, lack regular classroom seats. The school system is currently projected to add only 18% - 57,375[2] - of the 321,900[3] new seats needed as of 2002. We project that by that year overcrowding will more than double, and 21%, or 264,500 students will be crowded out of the classrooms. Furthermore, cuts to the capital budget will not only adversely affect the ability of the Board of Education to add new capacity but also its ability to perform critical maintenance work needed by some schools. This may result in a loss of current capacity.

The problem of overcrowding has spread rapidly around the City. Growth in enrollment is unevenly distributed. Schools in some districts are so overcrowded

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[2]The current Five-Year Capital Plan for FY 95-99 provides for less than half, $3.38 billion, of the initial budget requested by the Board of Education. This number incorporates additional cuts of 30%, already announced by the Office of Management and Budget, to the Board's current capital budget. Assuming a proportional impact on the budget, 12,045 new seats will be lost in this round of cuts.

[3]This number incorporates the existing and projected student overloads of the school system with no allowances for underutilization in other districts. It is greater than the projected increase in enrollment because of the overcrowding that already exists in the school system.

that classes have been held in bathrooms, hallways and closets, while others are underutilized and anticipate a continued decline in enrollment. In Queens, at PS 19 in District 24, many of the school's closets are being used as classrooms and at PS 89, in the same district, classes are taught in hallways and bathrooms. Overcrowding also varies with grade level. Most high schools operate at or above capacity and many are severely overcrowded. Overcrowding is also severe in elementary schools, although not to the same extent as in high schools.[4] In middle schools the problem is less severe. Figures from the 1993-1994 school year show that:

- Queens is the most overcrowded borough, with 6 of its 7 districts over capacity. District 24 in Queens is the most overcrowded district, at 131% of capacity in its elementary schools and 122% of capacity in its middle schools. For example: PS 128 is at 169 % of capacity and IS 73 is at 136% of capacity.

- In District 6 in Manhattan, 21 of the 25 elementary school buildings are overcrowded. This represents a district-wide utilization of 114%. District 6 is unique in being the only overcrowded district in Manhattan at the elementary level. For example: PS 128 in District 6 is at 142% of capacity while PS 61 in District 1 is at 55 % of capacity.

- In District 31, in Staten Island, both the elementary and high schools are close to full capacity and

---

[4]Elementary and middle schools are organized by districts whereas high schools, under the direct supervision of the Board of Education, are divided by borough.

experienced significant growth in enrollment over the previous year with utilization currently at 96%.

- Severely overcrowded districts also include 10 and 11 in the Bronx, 17, 18 and 22 in Brooklyn and 27, 28, 29 and 30 in Queens.

- 13 of 32[5] districts have overcrowded elementary schools. 415 of 744 elementary school buildings, 56%, are at 100% or more of capacity. 29,070 additional seats are needed citywide at present.

- Crowding is less of a problem in the middle schools. Only 5 of the 32 districts are overcrowded, with a shortage of 4,579 seats. 51 of the 184 school buildings, or 28%, are overcrowded. Many districts at this level have no overcrowded school buildings and the utilization is as low as 52% at IS 183 in District 7.

- At the high school level, all the boroughs, except Staten Island, are overcrowded, while the greatest problem is in the Bronx. 91 of the 111 high school buildings throughout the City, 82%, were at 100% or more of capacity in the 1993 school year. An additional 55,794 seats are needed.

- Immigrant students grew from 36,000, 4% of total enrollment, in 1989 to almost 160,000, 16% of enrollment, in 1993.

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[5]District 33, under the jurisdiction of the Chancellor, is not a geographically defined district as are the other 32 districts. Currently, the only school within this district is IS 227 located in Queens.

The Board of Education projects that overcrowding will get substantially worse by 2002 with the largest increases projected to occur in Queens and the Bronx:[6]

- District 29, in Queens, is expected to be the most overcrowded district and Queens will have 7 of the 10 most overcrowded districts, Districts 29, 24, 27, 30, 25, 28, 26, in the City.

- In the Bronx, all but one district, District 7, are projected to be overcrowded with 4 districts, Districts 9, 1 0, 11, and 12 at more than 122 % utilization.

- District 31, in Staten Island, will be among the more severely overcrowded districts at the elementary level.

- All but 3 of the 32 districts will be overcrowded at the elementary school level.

- 20 of the 32 districts will have overcrowded middle schools.

- There will be a shortage of 135,600 seats at the high schools.

The Board of Education, in association with the overcrowded school districts, has developed a wide array of

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[6]Projections vary, BOE projects enrollment growth of 240,642 between 1993 and 2002 while the Department of City Planning projects an increase of 126,000.

responses to overcrowding, including creative administrative solutions. However, increasing enrollment is overwhelming certain districts and the most overcrowded districts have already exhausted the traditional solutions to overcrowding, such as moving administrative offices and transferring grade levels from one school to the next. Other administrative solutions must be more fully investigated, for example, double shifting[7], busing, leasing, and year-round multi-track education.[8] The need to find alternate solutions to overcrowding becomes more pressing in view of the downward trend in capital funding for the school system. Alternatives will certainly cost money but these costs will be much smaller than traditional capital solutions, like building new schools, and are much more quickly implemented.

The experience of District 6, for many years the most overcrowded district in the City, the high schools and other overcrowded districts should be harnessed by the BOE and applied on a City-wide basis. New solutions will require adjustment on the part of students, teachers, parents, administrators, service providers and the community at large.

The Board of Education is currently reviewing recommendations made by its Redistricting Advisory Study

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[7]Double shifting involves the division of the student population into two separate groups that attend school on two different schedules or shifts in a day.

[8]Year-round multi-track education involves the use of schools during the entire year. It does not, however, mean that students go to school all year. Students are organized into several groups or tracks that attend school on different schedules.

Group. The recommendations call for major changes to school districts in the Bronx and in Queens. While redistricting has great potential to improve overcrowding conditions, the changes, as proposed will have minimal impact on overcrowding. Restrictions stemming from geography and other local factors make it impossible to take advantage of redistricting's full potential.

Agency's Comments

The BOE basically agreed with our findings and recommendations. The BOE indicated that it has been pursuing many administrative solutions in addition to capital expansion which it says is not adequate for the existing or anticipated level of student overcrowding. We have incorporated their comments where appropriate.

Recommendations

- The BOE should implement a program to study and evaluate the efforts of District 6 and the high schools over the last decade and use the lessons of that experience to design Programs to alleviate overcrowding city-wide. District 6 has been innovative in busing students to other districts, establishing long-term mutually beneficial relationships with other districts as well as successfully implementing double shifting at the elementary and middle school level.

- The BOE should establish year-round multi-track education in the districts that are overcrowded, and are growing faster than capital or administrative solutions can be found. School capacity is increased with year-round schooling because the schools are

used by alternating groups or tracks of students the entire year. Schools on year-round education must be air-conditioned for summer use and should be identified immediately. Air conditioning may be done on a room by room basis, or where necessary, the entire school may have to be retrofitted. Although we recognize that some capital funds will have to be expended for projects already under construction, the limited capital funds for planned new construction can be better spent on air conditioning the schools to allow year-round education.

- The Mayor's Office of Labor Relations should begin immediately to negotiate to resolve any issues with the United Federation of Teachers, the Council of Supervisors and Administrators, other affected unions, and all other organizations that may be affected by the change to year-round education.

- Old schools should be modernized and new schools should be constructed to allow use by different grade levels. For example, new buildings should be designed with a layout that permits use by middle and high school students. The lines of distinction between elementary, middle and high schools are being blurred by the need to move grades between the different levels and to have a more flexible grade structure in response to changing patterns of overcrowding. The BOE has begun to experiment with new high school construction that allows middle and high school students use. However, modernized high schools and middle schools should be modified similarly.

- Where necessary, busing should be used to transfer students from overcrowded schools to schools with space within a district as well as schools in other districts. In severely overcrowded districts such as District 24, in Queens, where there is limited underutilized space, busing to another district within the borough should be considered. Magnet schools could be established with special programs to attract parents and students. Also, District 24 could establish annexes to its own schools in available buildings in surrounding districts.

- Double shifting should be considered as a solution for schools with severe overcrowding and in need of an immediate solution. PS 19 and PS 89 in District 24, at 133 % and 147% capacity respectively, are examples of such schools to be considered. Additional funds need to be provided for the incremental increases in the operating costs incurred when a school goes to double shifts.

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CHAPTER 1

ENROLLMENT IS GROWING RAPIDLY

The New York City public school system, the largest in the nation with 1,015,758 students and 1,053 schools in the 1993-1994 school year, has seen a rapid increase in enrollment since 1989, that is expected to continue at least until the turn of the century. Enrollment has grown more rapidly than the system's facilities, resulting in serious overcrowding in some areas that is likely to grow worse and eventually spread throughout the system.

The school system is divided into 32 school district's that administer the elementary and middle schools, see Figure 1.[1] The high schools and schools for students with special needs are administered by the central Board of Education. Overcrowding exists at every level in the school system. However, it is most severe in the elementary schools and high schools. The main cause of overcrowding is a sudden large increase in the number of students. In 1988, the Board of Education completely revised the school utilization formulae for elementary, middle, high schools and special education. This revision significantly cut class sizes and therefore reduced school capacities, increasing overcrowding.

Public school enrollment grew rapidly in the 1950s

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[1]District 33, under the jurisdiction of the Chancellor, is not a geographically defined district as are the other 32 district. Currently, the only school within this district is IS 227 in Queens which is below capacity. This report will focus on the 32 geographic districts.

and 1960s, and peaked in 1971 at about 1,150,000, as shown in Figure 2. Between 1971 and 1982, overall enrollment shrank by 228,076. However, due to the 1975 fiscal crisis and the City's inability to borrow, the City was unable to build new schools in the few areas that had growing student populations. Meanwhile, to cut costs, the City got rid of many school buildings and slashed the school budget. At the

New York City

Community School Districts



Figure 1

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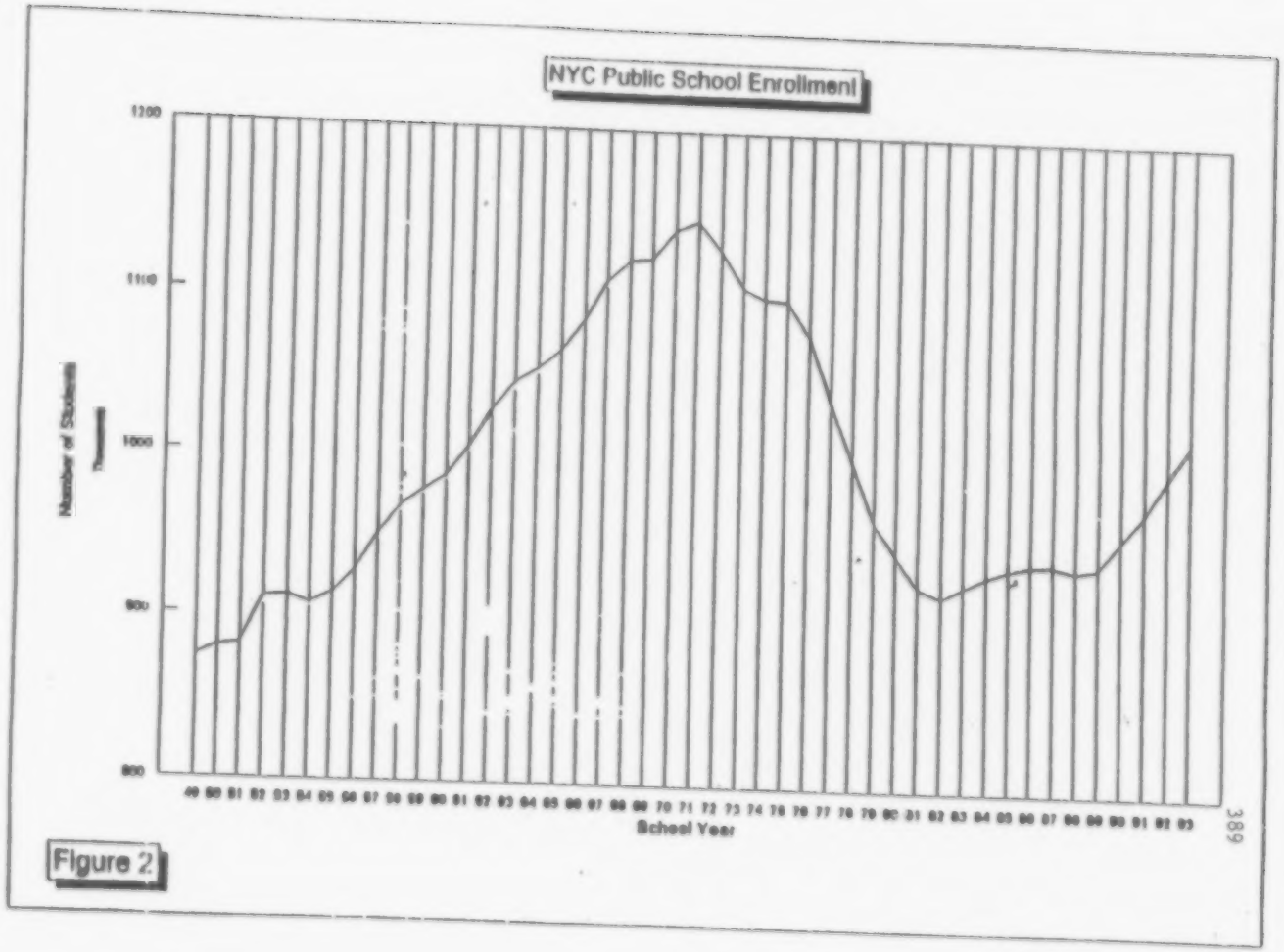


Figure 2

start of the last five-year Capital Plan in 1990, almost all school buildings needed some capital improvement. Thus, the City was ill-prepared when enrollment began to grow again in 1983, and really skyrocketed in 1989. City-wide enrollment has increased steadily from a low of 918,384 in 1982, to a 15-year high of 1,015,758 in 1993.

The New York City public school system grew by 21,263 students, the equivalent of an entire school district, in the 1993-1994 school year. This growth is expected to continue into the future and is exacerbating already severe overcrowding in many school districts. The Department of City planning, whose projections are usually more conservative than those of BOE'S, estimates City-wide enrollment for elementary and middle schools will increase from 689,109 in 1992 to 755,400 in 1997, a rise of 9.6%, and to 796,100 in 2002, a rise of 15.5%. The Board of Education's projections are for an increase of 10.8% to 763,670 in 1997 and a rise of 26.4% to 870,813 in 2002. For high schools, the Department of City Planning projects a 12.9% increase in enrollment from 283,810 in 1992 to 320,300 in 1997 and an increase of 21.5 % to 345,000 in 2002. The Board of Education's projections for high schools are for a 16.6% increase to 335, for 1997 and a 35.9% increase to 385,600 for 2002.[2]

Immigration

Increased immigration is the major cause of the recent rapid increase in enrollment. During the 1980's, an

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[2]The Grier Partnership, Final Report- Enrollment Projections 1993 to 2002: New York City Public Schools, February 1994, Appendix B and C.

average of 86,000 new immigrants came to New York-City every year, as shown in Figure 3.[3] The latest data available show that in 1992, 113,246 individuals (these are legal immigrants which include refugees) immigrated to New York City. These numbers are expected to continue increasing.

Immigrants coming to the City are younger than the general population, on average 26 years old compared to 33 years, and therefore have higher birth rates. Also, most immigrants send their children to the public schools. As of March 1991, more than 90% of the approximately 100,000 foreign-born students in the City were in public schools.[4] Figure 4 shows the increasing percentage of immigrants making up the school population.

Immigrants frequently congregate with others from the same country, so the increase in immigration has affected some school districts much more than others. The report by the City Planning Commission: The Newest New Yorkers: An Analysis of Immigration Into New York City During the 1980s, reveals the following:

> •A large number of immigrants has produced some of the severest overcrowding in District 6 in Manhattan. The immigrant community is moving northward and eastward, contributing to the severe overcrowding in District 10 in the Bronx as well as pocket overcrowding in District 9, also in the Bronx.

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[3]Department of City Planning, The Newest New Yorkers: An Analysis of Immigration Into New York City During the 1980's, June 1992. p.1

[4]Op. Cit. p.165

•District 17 in Brooklyn, which serves Flatbush and Crown Heights, has been strained by large immigration.

•Immigration in District 24 in Queens, which includes Corona and Elmhurst, has contributed heavily to overcrowding. Elmhurst is one of the most diverse immigrant areas in the City.

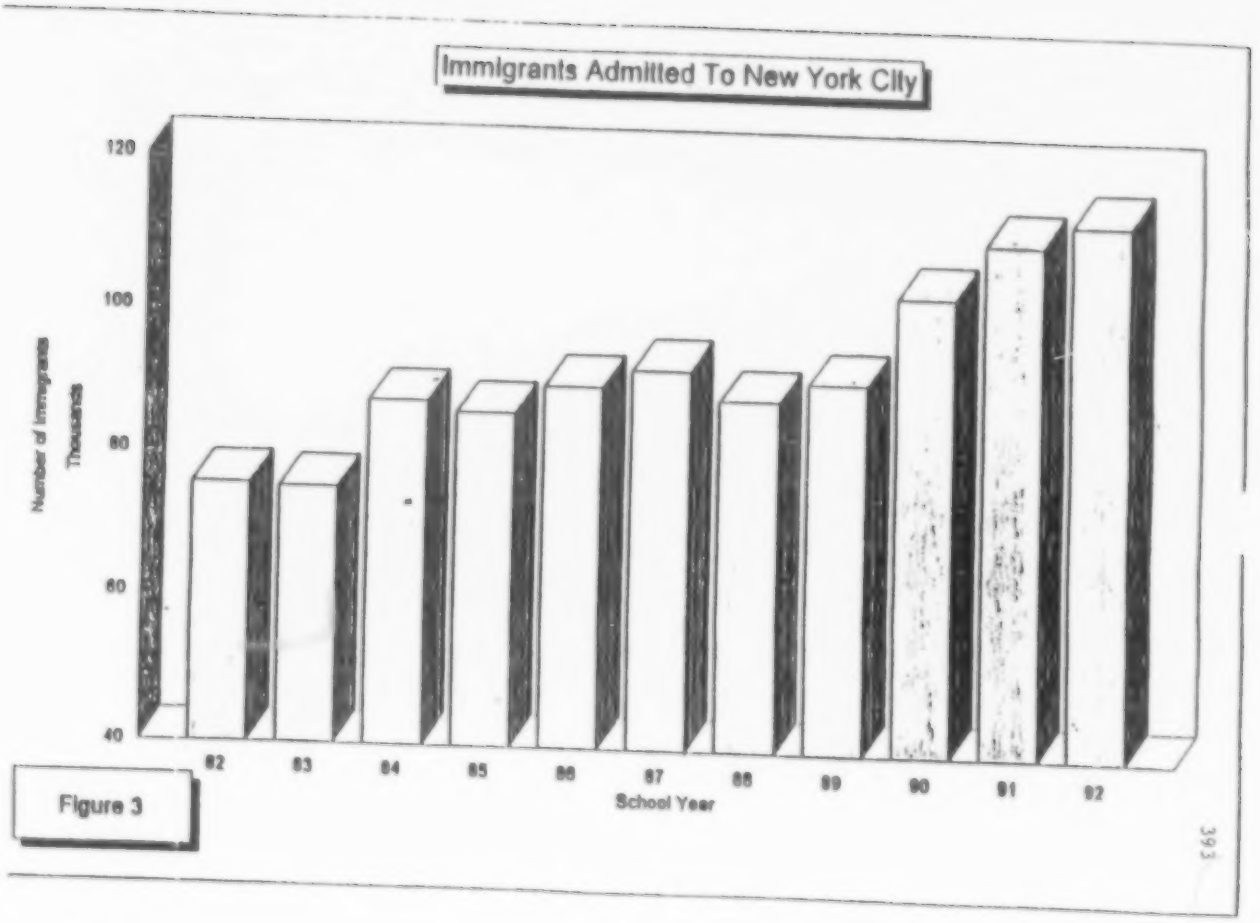

Immigrants Admitted To New York City
Number of Immigrants
Thousands
120
100
80
60
40
82
83
84
85
86
87
88
89
90
91
92
School Year

Figure 3

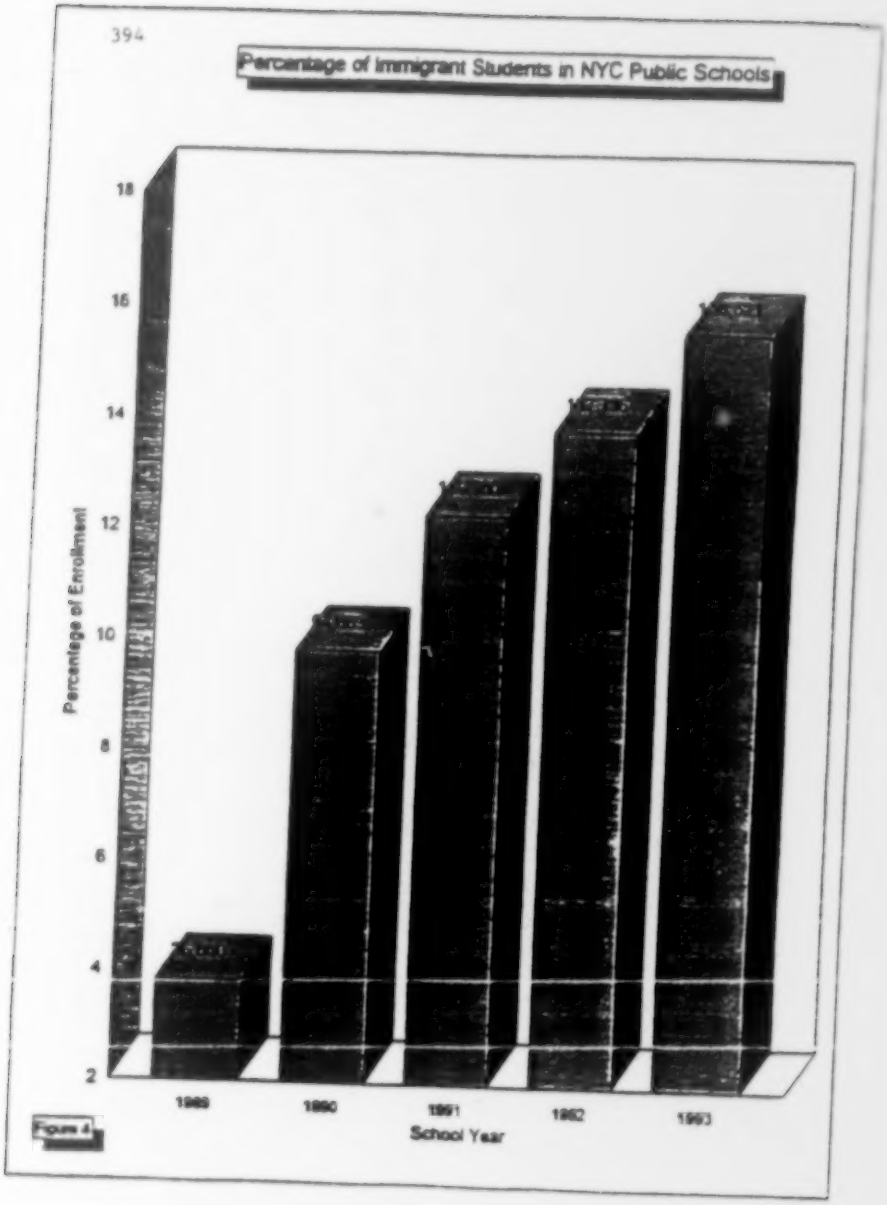

Percentage of Immigrant Students in NYC Public Schools
Percentage of Enrollment
18
16
14
12
10
8
6
4
2
1989
1990
1991
1992
1993
School Year

Figure 4

•District 30 in Queens, which includes Astoria, has been heavily impacted by immigration.

The wave of immigration is expected to continue as immigrants attract their families and relatives left behind in their countries of origin. Also, political instability in many parts of the world - Haiti, Eastern Europe, Russia, Africa, Southeast Asia - feeds the flow of immigrants.

High Number of Births

Births in the overcrowded districts are consistently higher than those in underutilized districts, as shown in Table 1.[5] The highest number of births occurs in District 10, with severe overcrowding, and is more than five times the number of births in District 26, with much underutilization. The number of births in New York City increased every year during the period 1981 to 1990. The high births result from the presence of a large number of women in the peak child-bearing age, between 20 and 29 years of age. The trend in the high number of births is expected to continue through the year 2000. However, the annual increases in births that occurred between 1981 and 1990 appear to be leveling off.

Special Education

Increases in Special Education have also had a significant impact on overcrowding. Special Education requires smaller classes, usually a maximum of 15 students in a class.

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[5]Department of City Planning.

TABLE 1

NEW YORK CITY BIRTHS BY SCHOOL DISTRICT

SD	1982	1985	1989	1990	1991	1992
1	1406	1491	1542	1500	1455	1439
2	6210	6567	6335	6513	6340	6271
3	3163	3273	3485	3431	3467	3429
4	1492	1604	2090	1827	1836	1816
5	2417	2595	2557	2812	2811	2780
6	5708	5666	5834	6011	5813	5749
7	2197	2226	2363	2391	2431	2404
8	3115	3258	3359	3524	3531	3492
9	5206	5497	5615	5653	5735	5672
10	6595	6724	6725	7307	7155	7077
11	3632	3962	4185	4292	4280	4233
12	2773	2944	2875	3083	2942	2930
13	3109	3312	3051	3281	3174	3139
14	3693	3783	3821	3903	3750	3709
15	3825	3909	3989	4133	4208	4162
16	1763	1845	1921	1890	1795	1775
17	5927	5915	5951	5852	5745	5682
18	2595	2738	2673	2780	2781	2751
19	3909	3795	3833	4124	4008	3964
20	5034	5140	5328	5538	5572	5511
21	3739	3877	3992	4139	3964	3950
22	5191	5299	5407	5549	5476	5416
23	1891	1960	2075	2052	2016	1994
32	2546	2686	2765	2905	2673	2644
24	5242	5578	5858	6121	6206	6138
25	3215	3269	3335	3509	3443	3405
26	1228	1259	1182	1348	1334	1319
27	4286	4478	4547	4831	4810	4757
28	3626	3697	4059	3938	3910	3867
29	3607	3885	3782	4060	3960	3917
30	4589	4623	4857	5117	5363	5304
31	5565	6045	5981	6391	6369	6299

Source: New York City Department of City Planning.

In 1975, Congress enacted legislation mandating educational equality for the handicapped. The Special Education program has mushroomed from approximately 48,827 students in 1979 to 139,660 in 1994 - more than a 286% increase, as shown in Figure 5. This is due to a broadened application of the definition of disability to include a range of emotional problems and learning disabilities.

Special education results in a lower density use of existing classrooms. Most classrooms are designed for a capacity of 37 students but are normally filled with 30 students. However, special education classes are much smaller, usually ranging from 6 to 12 students. Therefore, the smaller special education classes are frequently held in rooms designed for more students. BOE has begun to subdivide large rooms into smaller classes for special education classes.

Figure 5

Special Education Enrollment
Number of Students
Thousands
0
2
4
6
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
School Year

THE NATURE OF OVERCROWDING

Present Overcrowding

The degree of overcrowding in the public schools varies greatly. The most overcrowded building in the school system, the special education program at PS 58 in Manhattan, is at 252% of capacity, while the PS 23 annex in District 10 in the Bronx is only at 21% of capacity. For elementary and middle schools, District 6 in Manhattan traditionally has been the most overcrowded district.[6] However, District 24 in Queens now has that dubious distinction. The elementary and junior high school enrollments in District 24 am 131% and 122%, respectively, significantly higher than any other district. In fact, the borough of Queens is the most overcrowded borough in the City. Other severely overcrowded districts are 10 in the Bronx, 17, 18 and 22 in Brooklyn and 27, 28, 29 and 30 in Queens. At the high school level all the boroughs are overcrowded, except Staten Island, but the problem is greatest in the Bronx. The problem of overcrowding is best studied by looking at the three different school levels separately.

Elementary Schools

Table 2 shows that thirteen of the City's 32 school districts are overcrowded in the elementary schools by a total of 29,070 students. Numbers from the 1993-1994 capacity utilization report indicate that 56% or 415, of the 744 school buildings were at 100% or more of capacity.

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[6]Office of the Comptroller, Out of Space: An Analysis of Our School, September 1986, p.5.

TABLE 2
ELEMENTARY SCHOOL UTILIZATION

School District	Number of occupied buildings	Capacity	Enrollment	Utilization Percentage	Buildings with enrollment equal or greater than 100%
MANHATTAN					
1	14	10243	7440	73	0
2	26	18888	16297	86	13
3	18	13180	10985	83	5
4	16	13552	11134	82	3
5	14	12856	11672	91	6
6	28	25482	23307	1164	23
BRONX					
7	17	14223	11616	82	2
8	24	16614	14526	89	10
9	23	22184	20806	94	16
10	45	23140	26840	119	35
11	23	13662	17201	109	18
12	19	16876	14722	92	3
BROOKLYN					
13	19	16153	13877	86	3
14	20	16266	13991	86	7
15	24	16846	16787	100	10
16	14	12646	9826	78	1
17	27	17773	18179	102	18
18	17	16991	22521	133	16
19	26	19301	18473	99	13
20	22	17662	16836	96	9
21	23	16798	13341	91	8
22	26	18462	28862	130	20
23	14	11267	9656	86	3
24	15	11528	10866	97	5
QUEENS					
26	27	19830	19867	101	27
25	20	15525	16675	107	15
26	21	16804	18165	93	7
27	32	25960	34624	134	27
28	27	15480	18829	166	25
29	23	15856	17934	166	22
30	26	17360	18877	1111	20
STATEN ISLAND					
31	46	33651	34686	96	20

Source: Board of Education, 1991-1996 Enrollment, Capacity, Utilization, November 1996

New York City Public Schools
1993 Elementary School Utilization
by District

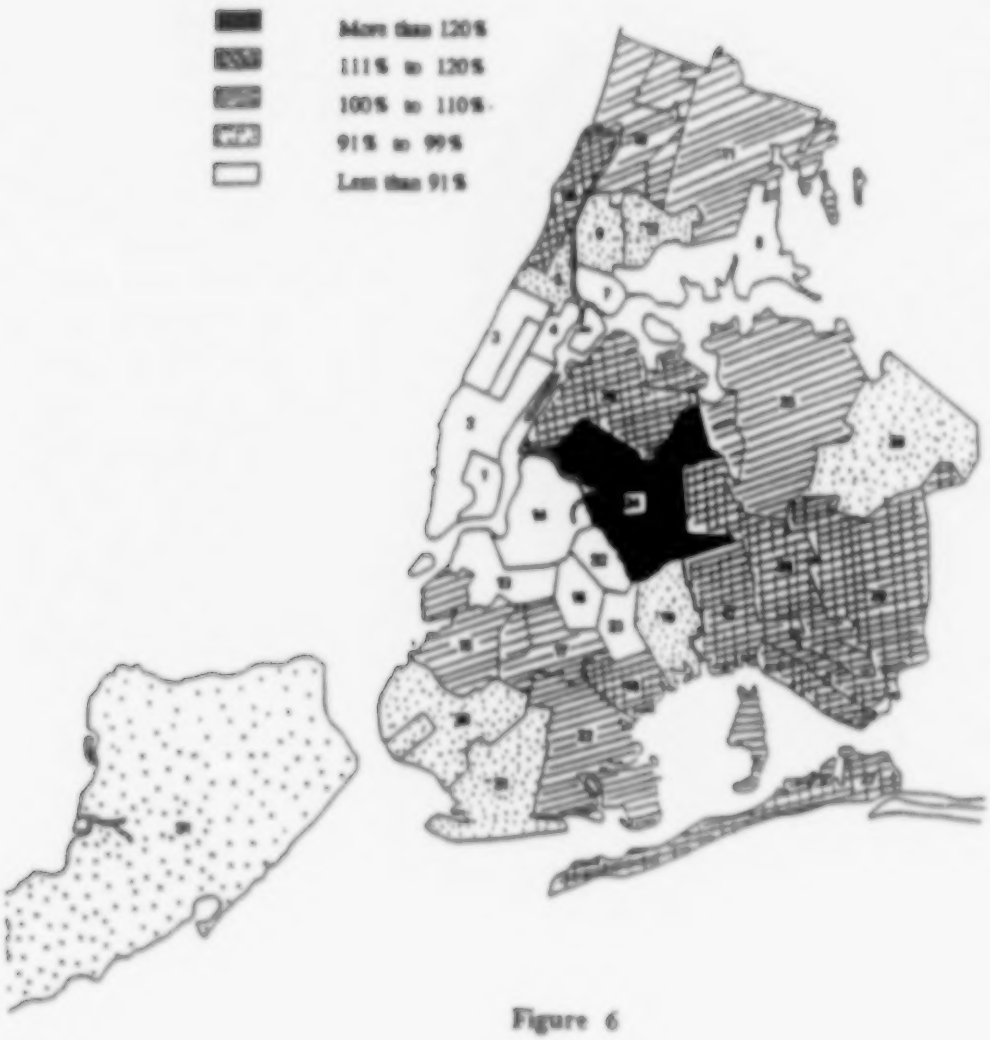


Figure 6

Table 2 also shows that for District 6, in Manhattan, 21 of the 25 elementary school buildings are overcrowded. This represents a district-wide utilization of 114%. District 6 is unique in being the only overcrowded district in Manhattan at the elementary level. On the other extreme, six of the seven districts in Queens are overutilized, with District 24, at 131% utilization, being the most severe City-wide. Every one of the 27 elementary school buildings in the district are overcrowded. In Staten Island's District 31, 20 of its 44 elementary school buildings are overcrowded and borough-wide utilization is 96%. Two of the Bronx's six districts are overcrowded while four of Brooklyn's 12 districts are overcrowded. Four districts: 9 (Bronx), 19 and 20 (Brooklyn), and 31 (Staten Island) are close to capacity at 95% or more. See Figure 6.

Middle Schools

The problem of overcrowding is much less severe in the middle schools than at other levels. Five of the City's 32 districts are overcrowded by a total of 4,579 seats. Twenty eight percent, or 51 of the 184 school buildings are at 100% or more of capacity.

Table 3 shows that District 24 in Queens is the most overcrowded middle school district in the City. All 8 buildings in District 24 are overcrowded, representing a district-wide utilization of 122%. Because of a large increase in enrollment, District 30 is now the second most overcrowded district at this level in Queens, however, Districts 29 and 27 are close to capacity, at 97% and 96% utilization respectively. Queens is the only borough

TABLE 3
MIDDLE SCHOOL UTILIZATION

School District	Number of occupied buildings	Capacity	Enrollment	Utilization Percentage	Schools with enrollment equal or greater than 100%
MANHATTAN					
1	4	5521	3480	63	0
2	5	6525	4994	77	0
3	4	4953	4021	81	2
4	4	4770	3551	74	0
5	3	4477	2941	66	0
6	6	6776	7343	108	5
BRONX					
7	6	7560	4719	62	0
8	10	11285	7886	70	1
9	7	9648	8561	89	1
10	10	9133	10252	112	6
11	7	9013	8429	94	2
12	5	7184	4968	69	0
BROOKLYN					
13	4	4910	2793	57	0
14	6	7554	5304	70	0
15	5	6189	4697	76	2
16	2	2815	1815	64	0
17	7	9659	8455	88	1
18	5	5703	5633	99	2
19	6	6242	4490	72	0
20	6	7806	8704	112	5
21	6	8579	6883	80	0
22	5	6973	6771	97	2
23	4	5139	3287	64	0
32	5	7098	6294	89	1

Source: Board of Education, 1993-1994 Enrollment, Capacity, Utilization, November 1994.

TABLE 3 continued
MIDDLE SCHOOL UTILIZATION

School District	Number of occupied buildings	Capacity	Enrollment	Utilization Percentage	Schools with enrollment equal or greater than 100%
QUEENS					
24	8	[illegible]	[illegible]	[illegible]	8
25	6	7814	6611	85	0
26	5	5976	5523	92	2
27	6	8592	8269	96	3
28	5	6858	6445	94	3
29	5	7366	7169	97	1
30	6	6121	6387	105	3
STATEN ISLAND					
31	11	14413	11207	78	1

Source: Board of Education, 1993-1994 Enrollment, Capacity, Utilization, November 1994.

with two overcrowded districts at this level. In Staten Island, the middle schools are underutilized, operating at 78% of capacity, with only one school building at or above capacity. See Figure 7.

High Schools

The problem of overcrowding in the high schools is consistently severe in all boroughs except Staten Island. Eighty-two percent, or 91, of the 111 high school buildings City-wide were at 100% or more of capacity during the 1993-1994 school year (See Table 4). An additional 55,794 seats are needed to satisfy the overcrowding at this level. In

New York City Public Schools
1993 Middle School Utilization
by District

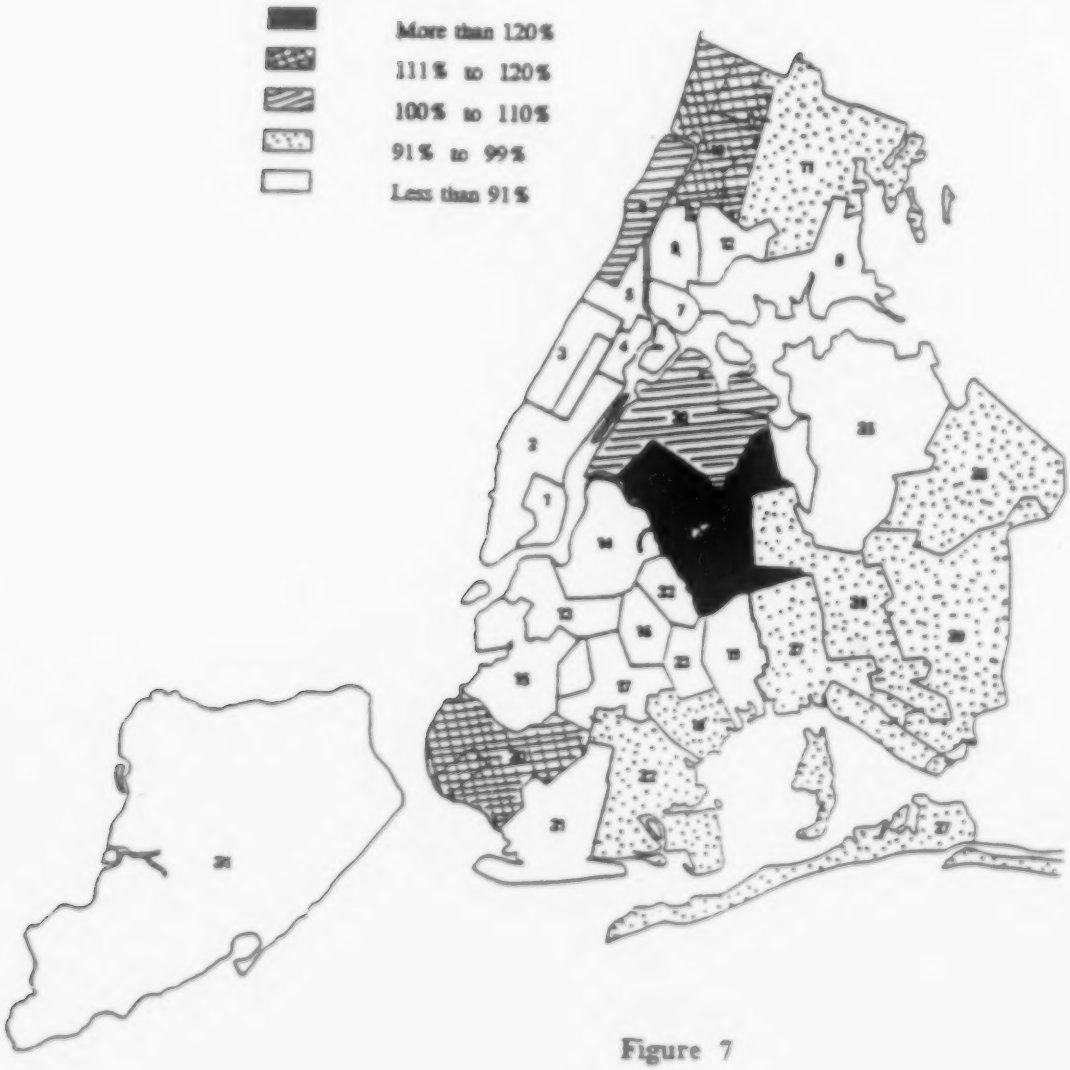


Figure 7

addition to the primary causes of overcrowding at the elementary and middle school levels (immigration and high births) other factors contribute to overcrowding at the high school level. The practice of moving the ninth grade from middle schools to high schools has significantly added to the overcrowding. Another factor affecting overcrowding is modernization. As schools are brought up to modem standards, space is usually lost. For example, many modernizations involve additions of science and computer labs thereby reducing the space available for classrooms. Improvement in the drop-out rate has also contributed to high school overcrowding.[7] Between 1989-90 and 1991-92, the latest year for which data is available, the drop-out rate declined from 6.6% to 4.8%[8] Related to the improved drop-out rate is that many high school students take longer than the traditional 4 years to move through the system.

Table 4 shows that overcrowding is most severe in the Bronx where the utilization rate is at 135%. Sixteen, or 89 %, of the 18 schools in the Bronx are overcrowded. In Brooklyn where utilization is at 133%, 33 of the 35 schools, or 94% are overcrowded. As with the elementary and middle schools, Staten Island high schools are underutilized with a 96% utilization rate. However, 39%, or 3 of the eight high schools in Staten Island are overcrowded.
See Figure 8.

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[7]New York City Board of Education, Year 2003 Master Plan, April 28, 1993, p.72

[8]New York City Board of Education, Division of High Schools.

TABLE 4

ACADEMIC AND VOCATIONAL HIGH SCHOOL UTILIZATION*

Borough	Number of occupied buildings	Capacity	Enrollment	Utilization Percentage	Schools with enrollment equal or greater than 100%
Manhattan	[illegible]	40410	[illegible]	[illegible]	17
Bronx	[illegible]	39815	[illegible]	[illegible]	16
Brooklyn	[illegible]	67233	[illegible]	[illegible]	33
Queens	[illegible]	48017	[illegible]	[illegible]	22
S. Island	8	14602	13945	96	3

* Data has not been officially released by BOE as of January 1995.
Source: Board of Education, December 1994.

New York City Public Schools
1993 High School Utilization
by District



Figure 8

FUTURE OVERCROWDING

Based on demographic analysis, planned housing and school capacity additions, BOE makes 5-year and 10-year enrollment projections. With 1992 as a base year, current projections are for the years 1997 and 2002. See Appendices 2-7.[9]

BOE estimates that 24 school districts at the elementary level and 8 school districts at the middle school level will be overcrowded by the year 1997. By 2002, all but three of the 32 school districts will be overcrowded at the elementary level, and 20 of the school districts overcrowded at the middle school level. The overload[10] for the year 2002 is projected to be 116,900 for elementary and middle schools. The largest increases are projected to occur in Queens and the Bronx. Five of the 7 districts in Queens are expected to grow by more than 10,000 students each by 2002. In the Bronx, 3 districts are projected to grow by 10,000 students and I district by 9,000.

Total high school overload is projected to be 135,600 by 2002. By 1997, and continuing to 2002, the borough of

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[9]Appendices 2 through 7 were reproduced from BOE's 2003 Master Plan and shows 1997 and 2001 overcrowding levels. Although the data presented in these maps provide a clear graphical representation of the nature of the problem.

[10]Overload is used here as a measure of the seats needed to satisfy the overcrowding. It is the projected enrollment in the districts that are overcrowded less the capacity in those same districts. Reflecting the actual utilization patterns in the school system, it does not incorporate available capacity in underutilized districts.

Queens will be experiencing the most overcrowding at the high school level. Staten Island, currently the only borough with available high school space will be overcrowded by 1997.

CHAPTER 2
RESPONSES TO OVERCROWDING
Capital Construction

For many years after the fiscal crisis of 1975, the City had no access to the credit markets and therefore City-funded construction was virtually eliminated. In FY 79, the Board of Education's (BOE) capital expenditure was only $53.7 million. As the City regained access to the credit markets, this expenditure, grew steadily to a level that averaged $137 million annually for the years FY 84 - FY 88, see Figure 9. With an increased capital budget, BOE began to build new schools and add capacity to existing schools in the overcrowded districts. BOE's response was still inadequate to meet demand and school construction progressed very slowly. Many design and construction projects experienced serious delays.[11] BOE's efforts were hampered by the Wicks Law, which adversely affected the efficient management of the school construction process.[12] Delays were also caused by the site selection process and other predesign activities. Combined, these delays resulted in schools taking as long as nine years to complete.[13]

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[11]Office of the Comptroller, Design and Construction of Schools in Overutilized School Districts, November, 1987, p.2

[12]By New York State Wicks Law, municipal construction contracts over $50,000 must be bid in at least four separate contracts, electrical, plumbing, heating ventilation and cooling (HVAC) and construction.

[13]Office of the Comptroller, Design and Construction of Schools in Overutilized School Districts, November 18, 1987, p.2.

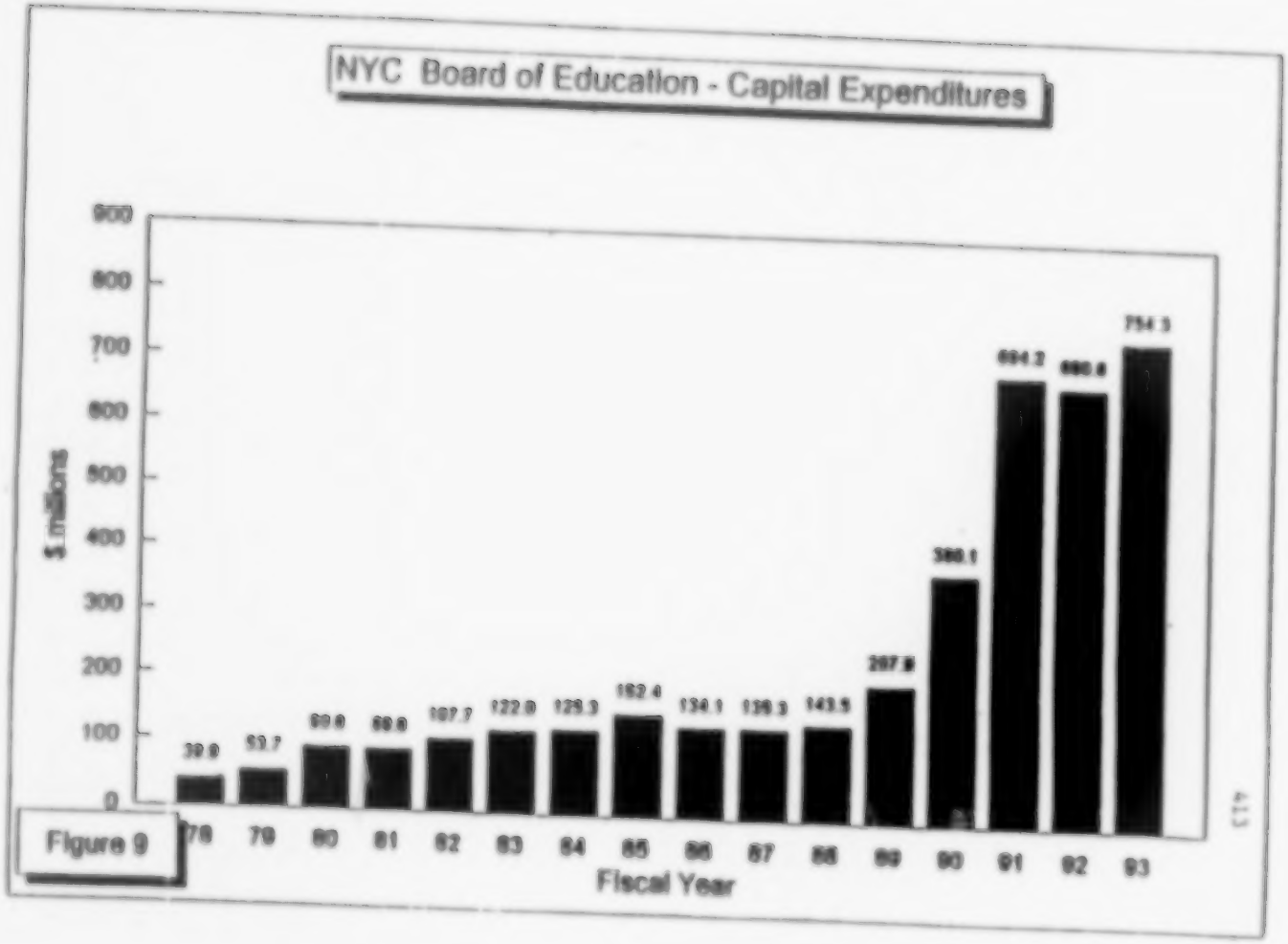

NYC Board of Education - Capital Expenditures
$ millions
900
800
700
600
500
400
300
200
100
0
39.8
53.7
69.6
68.8
107.7
122.0
125.3
152.4
134.1
136.3
143.5
207.8
380.1
694.2
680.8
754.3
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
Fiscal Year

Figure 9

The School Construction Authority (SCA) was formed in December 1988 to streamline the City's school construction process. The State legislation creating the SCA exempted it from provisions of any general or local law, City charter, administrative code, or ordinance governing site selection, land use and City Planning Commission review, historic preservation or architectural review.[14] The SCA was also exempted from the Wicks Law for five years, and granted the BOE one-time rather than annual approval of its five-year Capital Plan. Since 1988, SCA has completed 8 mini schools, 12 new schools, 12 projects involving building additions and 18 school modernizations, providing 18,140 additional seats. As of June 1994, 24 new schools, 18 projects involving building additions, and 29 modernizations are under construction, funded by the first five-year Capital Plan, which will provide an additional 29,269 seats.

Administrative Solutions

The central school board is responsible for implementing capital construction solutions to the overcrowding problem. The local school districts are responsible for administrative solutions. Some administrative solutions require the Board's involvement, for example, requests for leasing must be submitted to the Board by the local districts. There are also interdistrict solutions to overcrowding, such as busing, which require coordination between districts that can be facilitated by the central board.

Numerous space saving measures are employed to varying degrees throughout the school system to relieve

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[14]City of New York, Executive Budget, FY 90, p. 254.

overcrowding. These measures include:[15]

A. Transferring students to schools with available capacity by:

- Establishing annexes in under-utilized school buildings
- Busing
- Rezoning the catchment areas for individual schools
- Recapping, involving the transfer of 5th and 6th grade students from middle to elementary schools
- Truncating, involving the transfer of 5th and 6th grade students from elementary to middle schools
- Reassigning the flow of elementary school students to middle schools
- Changing grade structure

B. Reassigning classrooms dedicated to special programs to regular use

C. Relocating non-instructional administrative programs that occupy classroom space

D. Leasing space for relief of overcrowding

E. Reassigning leased space to school organizations that are occupying classroom space and are willing to surrender their lease

F. Shifting ninth grade middle school students to high schools

Building New Schools or Expanding Old Schools

The additional capacity needed to satisfy BOE projected overcrowding for 1997 of 172,000 seats (76,000

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[15]Board of Education, District 24 Space Analysis, 1993, p. 14-16.

seats for elementary and junior high schools and 96,000 seats for high schools) dwarfs the amount of new space funded in the FY 95-99 Five-Year Capital Plan (28,105 seats in total).[16] Capital funding for the SCA was cut by 55% from the Board's initial request of $7.3 billion to $3.3 billion. An additional cut of 30% in the capital budget has recently been announced by the Office of Management and Budget. Significant portions of the current Five-Year Capital Plan, particularly in the first two years, FY 95 and FY 96, are devoted to the completion of projects initiated under the previous Five-Year Capital Plan. Furthermore, emphasis is shifting from building new schools to maintaining and modernizing existing school buildings.

Leasing

The use of leased commercial space as a solution to overcrowding is growing dramatically, particularly in the less traditionally overcrowded districts. This is because leased space is less expensive and more quickly acquired than new buildings. Figure 10 shows the growth of newly executed leases since 1989. Only 7 new leases were executed in 1989. By June 1994, 11 new leases had been executed with a projected total of 22 executed leases for 1994.[17] Of the leases executed between January 1989 and June 1994, size ranges from 1,700 square feet to 235,000 square feet. The cost of alterations also varies

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[16]Board of Education, December 6, 1994, includes the estimated impact of the most recent 30% cut.

[17]The current five year capital plan allocates $170 million for 15,000 new seats from leased space. Due to cut backs in the capital plan, funding to acquire and renovate new leases will be terminated after FY 1996.

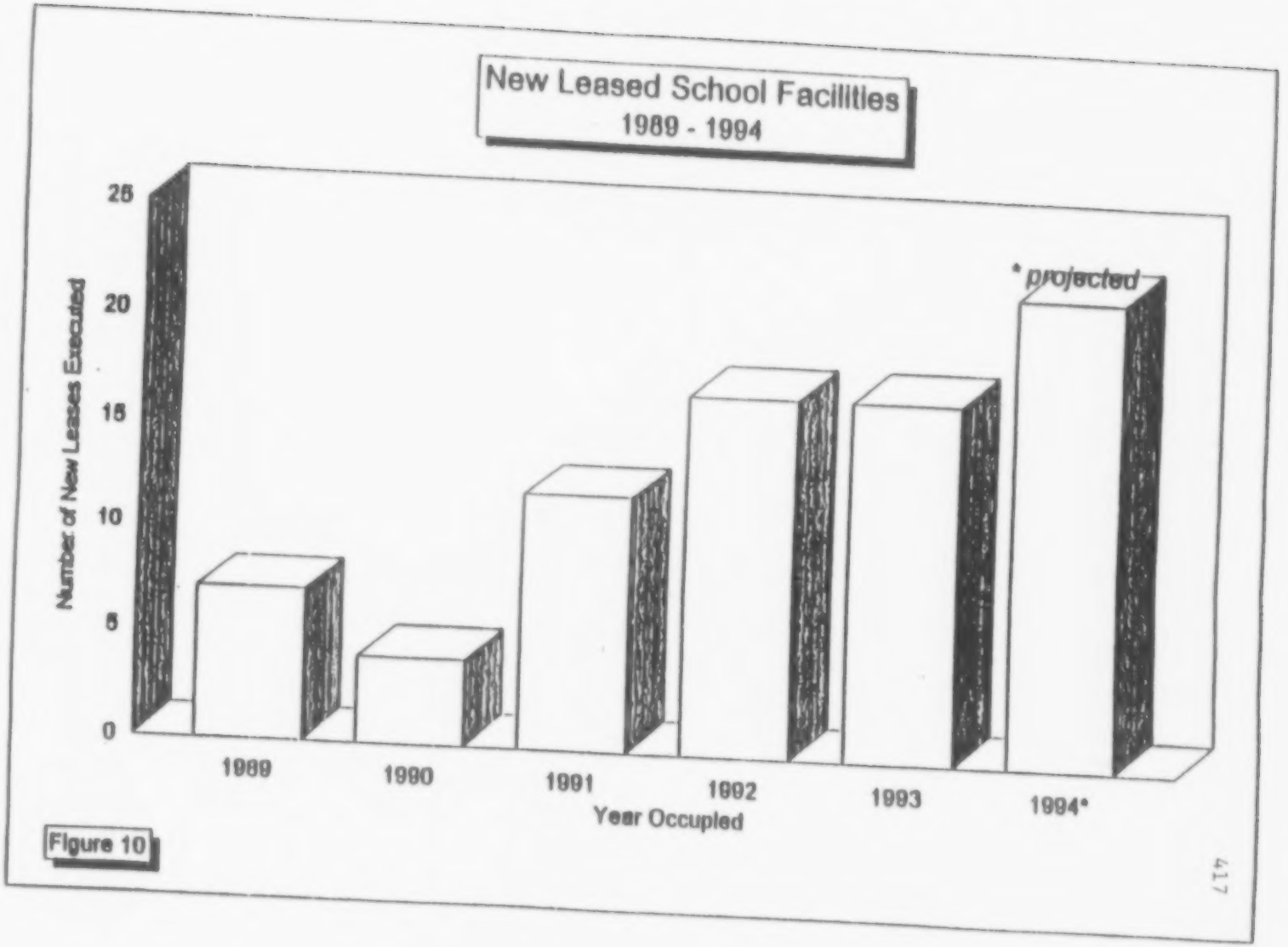

New Leased School Facilities
1989 - 1994
Number of New Leases Executed
25
20
15
10
5
0
1989
1990
1991
1992
1993
1994*
* projected
Year Occupied

Figure 10

widely, ranging from no cost to $23 million. Over 43% of the leased space, for elementary, middle and high schools, is used for administrative use, see Table 5. High school use accounts for 26.2% while 40% is used by elementary and middle schools, 26.2% for instructional purposes and 13.8% for noninstructional purposes. The majority of the school districts have only one leased facility that they use for instruction. Of the 26.2% of leased space used by the school districts for instructional use, most (20%) is by elementary schools. The remaining 6.2 % is used by middle schools.

TABLE 5
LEASED SCHOOL FACILITY USE

Usage	Percent of Total
Special Education: Classroom	4.6
Special Education: Administrative	12.3
Board of Education: Administrative	16.9
High Schools	26.2
School Districts	40.0
Instructional use	26.2
Non-instructional use	13.8
	100.0

Source: New York City Board of Education

Districts 25, 28, 29 (Queens) and 9 (Bronx) are examples of school districts actively pursuing new leases. District 6 has not applied for a new lease since 1992. BOE currently has 146 leases with private owners and is negotiating approximately another 120. Leasing is centrally administered by BOE. Individual districts must identify buildings they wish to lease and make a request to BOE. Sometimes commercial brokers are used to identify available

space. It usually takes 12 to 18 months from site identification to occupation.

In addition to directly relieving overcrowding, leases have been used to move administrative offices out of the school buildings and into commercial space so that all the available space originally designed for instructional use is so used. Most of the administrative offices in the most severely overcrowded districts are already housed in leased commercial space. Leases usually have a term of 15 years with a minimum duration of seven years in order to qualify for funds from the capital budget. Commercial space availability has been high and therefore lease rates have been relatively low. This trend is changing as the economy improves.

The BOE has leased space from parochial school systems, however the extent of this opportunity is limited. Jewish organizations generally have an overcrowding problem of their own due to increased immigration. The Catholic school system is reluctant to lease space to the public school system because of controversial issues such as the distribution of condoms to students.

The district with the highest rate of leasing is District 10 with 9.1 % of its students, or 3,247 in leased space followed by District 6, with 876 students. or 3.6%.

Busing

Few solutions to overcrowding have the potential for immediate large scale impact as do busing or transferring students to other schools or districts. Few students, however, are bused beyond their home school to relieve overcrowding. Of the over 696,000 students in the

elementary and middle school system during the 1993-94 school year, 5,604 were bused to an alternate school; 3,477 of which were bused within their district from 15 overcrowded school districts and 2,127 were, bused outside their district from 5 overcrowded school districts. Inter-district busing is mostly practiced in District 6 in Manhattan (see Figure 11), where 1,407 students, approximately 5.9%, of the elementary and middle school population

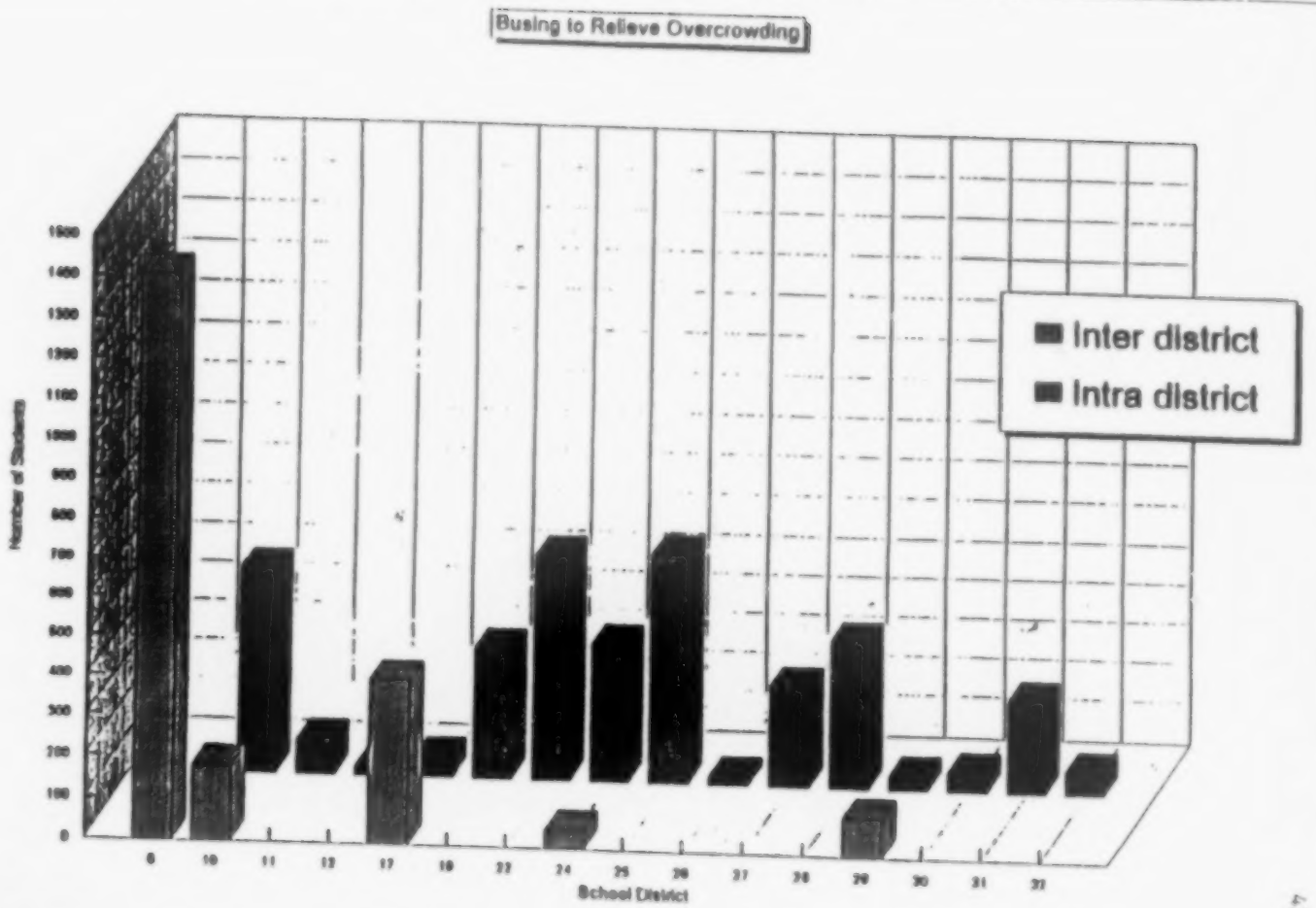

Busing to Relieve Overcrowding
Inter district
Intra district
Number of Students
School District

Figure 11

were housed in Districts 1, 3, 5, (Manhattan), 7 and 12 (Bronx).[18] This represents 10.2% of the total enrollment of the source schools.

District 6 has been busing its students for over a decade. In the beginning of the busing program, the students that reported to their zoned school for registration after the school had reached capacity were bused to an adjacent school within the district. These students would stay at the receiving school for the rest of the school year. The following year the parent would have the option of allowing the child to remain at the receiving school or return to the zoned school. As District 6 ran out of space, it created annexes in nearby districts, initially PS 151 in District 7. In addition to annexes, District 6 has transferred some students to the registers of other districts. In this case the students are not on District 6's register while they are attending school in the other district. During the 1993-94 school year, District 6 had approximately 1,000 students on the registers of Districts 3 and 5 and 450 students in annexes in District 7. The level of busing in District 6 has declined as newly constructed buildings are occupied.

Inter-district busing has not been popular because of community resistance to moving students from one district to another. Parents must get their children prepared for school earlier than normal because of additional travel time to the new location. Families with two or more children do not want them in different schools at the same time. Parents are also hesitant to put their children on a bus to a remote location. Some districts are reluctant to receive out-of-district students. These objections have been overcome, at least in part, in District 6. Surprisingly, some students are

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[18]District 6 Space Analysis, p.14, Fall 1992.

bused as far away as District 1 on the Lower East side of Manhattan. Approximately 130 students were bused to District 1 in school year 1993-1994.

In fact, many types of transfers out of District 6 occur. In addition to the 10-mile from District 6 to District 1, through Manhattan rush hour traffic, students also travel to District 7 and 12 in the Bronx. Some parents will make the extra effort to send their children as far away as District 1 in search of a better environment. Others will make the extra effort so that their children can receive a "normal schedule" and avoid double shifts. Some parents are able to work because their children are supervised for a much longer period than the normal school schedule at the zoned school would provide.

There is a financial incentive for the district that receives students from overcrowded districts. The receiving district gets more funds from the BOE in direct proportion to the number of students transferred. In addition, housing bused students keeps the receiving school more fully utilized so that custodial services are increased or maintained, which may not happen if the building is not fully utilized.

Busing within the borough is a workable strategy to relieve overcrowding in most districts. Throughout the City, almost all the overcrowded districts are adjacent to under-utilized districts. For example, District 5 (Manhattan), located just south of District 6, has an elementary school underutilization of 728 seats and a middle school underutilization of 1,833 seats. Table 6 shows some of the most overcrowded districts and the adjacent underutilized districts.

The borough of Queens is an exception, with acute

overcrowding throughout the elementary and middle schools because of high immigration. District 24 is the most overcrowded in the City. Even with the planned construction of new schools and the pursuit of other administrative solutions to overcrowding for District 24, the problem is projected to get much worse. Capital solutions to overcrowding are not feasible because of the amount of additional capital and time required to build additional schools. Busing should be part of the mix of administrative solutions that are implemented in District 24.

As with District 6, inter-district busing could have a significant impact on overcrowding in District 24. If implemented to the same degree, 5.9% as in District 6, overcrowding could be reduced by over 1,680 seats. This would provide the equivalent space of two new schools costing $50-70 million.

The most crowded schools in District 24 in Queens are concentrated in the northeastern portion of the district, Region 1, and in the central portion of the district, Region 3, (see map, Figure 12.) The students from Region 1, in the northeast, can be bused to middle schools in District 25 which are generally underutilized, and to elementary schools and middle schools in District 26. The underutilized schools in District 26 are clustered more in the center and eastern portion of the district. The students at the schools on the central portion, Region 3, of District 24 could also be bused to District 26. These bus rides would be long, however, as in District 6. The benefits of busing to another district may outweigh the disadvantages.



Board of Education, District 24 Space Analysis, 1993, p. 6.

Figure 12

Other Alternatives

Overcrowding is severe enough that BOE and the school districts have had to find creative solutions. Building new schools would be prohibitively expensive and slow in response to the immediate need. BOE has implemented several initiatives that help to alleviate overcrowding while reducing capital costs. Each program has its own incentives for parents. For example, the college collaborative program offers the convenience of location for college students with school-aged children. Some of these are outlined below:

Choice

With the Choice Program parents have the option of enrolling their children in a school within their district but out of their zone or in a school in another district. The "receiving" school, however, must be underutilized. Working parents benefit by having their children near their work location.

College Collaborative

Some colleges within the City University system house high school programs, for example, LaGuardia, Hostos and Bronx Community Colleges. BOE plans to expand this program. Additionally, BOE is opening Family Colleges to provide pre-Kindergarten through second grade classroom space on the campus for the children of college students.

Secondary Collaborative

To take advantage of underutilized middle school space, BOE has created new high schools using nontraditional grade structures, such as grades 6-12

or 7-12.

Headquarters Consolidation

Three buildings in the BOE headquarters complex are to be returned to school use. These buildings were originally designed for school use so the reconversion requires minimal capital expenditure.

Partitioning

Full-sized classrooms can be partitioned for use by smaller classes such as special education. Thirty seats can be gained for every full-sized room partitioned for special education.

TABLE 6
SOME OVERCROWDED DISTRICTS WITH ADJACENT UNDERUTILIZED DISTRICTS

District	Capacity	Enrollment	+/-	Capacity	Enrollment	+/-
District 6	23862	25701	+1839	8724	7848	-867
Adjacent District 5	12834	11672	-1184	4477	2941	-1536
District 10	22140	26045	+3905	9237	10333	+1099
Adjacent District 9	22184	22036	-148	9648	8561	-1087
Adjacent District 12	16076	14722	-1354	7184	4968	-2216
District 17	17723	18579	+1304	9458	8455	-1304
Adjacent District 13	16155	13877	-2278	4910	2793	-2117
Adjacent District 16	12646	9826	-2820	2815	1815	-1000
District 18	16801	17221	+1380	5793	5663	-130
Adjacent District 19	19595	19473	-122	6242	4490	-1752
Adjacent District 23	11262	9696	-1566	5139	3287	-1852
District 24	15850	19667	+4617	8063	9862	+1799
Adjacent District 25	15525	16675	+1150	7814	6611	-1203
District 28	15480	18029	+2549	6854	6405	-453
Adjacent District 26	16894	16165	-729	5976	5523	-453
Adjacent District 25	15525	16675	+1150	7814	6611	-1203
District 29	13854	17454	+3618	7066	7169	+197
Adjacent District 26	16894	16165	-729	5976	5523	-453
District 30	17346	18377	+1031	6211	6387	+226
Adjacent District 25	15525	16675	+1150	7814	6611	-1203

Source: Board of Education, 1993-1994 Capacity, Enrollment, Utilization Book, November 1994.

PROMISING SOLUTIONS

Double Shifts

Double shifting involves the division of the student population into two separate groups that attend school on two different schedules or shifts in a day. One shift is scheduled for early classes and the other is scheduled for later classes. The two shifts can be arranged so that the second shift begins just as the first one ends, or it can be arranged so that both shifts overlap. These variations are known as split and overlapping shifts, respectively. Split shifts are preferable, but require a longer school day. Overlapping shifts are more complicated to handle, but require a shorter day than split shifts. When overlapping shifts are employed, the overlap or common periods are scheduled for programs such as gym classes, lunch or assembly.

Double shifting is not widely used in the New York school system at the elementary or middle school levels. It is used in many overcrowded high schools and in District 6 in Manhattan. Five schools in District 6 have been or are on double shifts: PS 115, PS 28, PS 128, IS 52, and IS 164. Double sessions have been effective in addressing severe overcrowding in particular schools in the district. For example, IS 52, in Washington Heights, has been at times one of the most overcrowded junior high schools in the school system. Administrators there used double sessions for 12 years, from 1982 to 1994. In February 1994, additional school space was made available that allowed IS 52 to move back to single sessions. Over the twelve years that double shifting was practiced, administrators at IS 52 worked out the kinks in implementing double sessions and have become quite knowledgeable on the issue. In 1991 when overcrowding was at its worst, IS 52 operated at

approximately 150% of capacity.[19] Currently, there are 1,400 students at IS 52.

Each school year administrators at IS 52, which houses grades 5-8, estimate the degree of overcrowding through early registration. Classes are assigned on a first come first served basis. Late registrants are bused to another school or double shifting is initiated. IS 52 practiced school-wide double shifting, where the entire school is on double shifts. IS 52 experimented with split and overlapping shifts, in response to different conditions at the school. It finally adopted overlapping shifts. Figure 13 shows examples of overlapping shifts used by IS 52. The schedules are arranged so that students from both shifts are never in conflict for the same classroom or other space. Both shifts may come together for certain classes, e.g. Assembly. The younger students are put on the earlier shift while the older children are put on the later shift.

Some teachers were apprehensive before the program started, however, they understood the need for the changes and eventually were cooperative. At IS 52, teacher assignments were not a problem because the teachers were assigned to shifts based on grade level. Teachers with Common Branch licenses, that taught grades 5 and 6, were assigned to the early shift because these grades were on the early shift. Similarly, teachers with junior high school licenses, that taught grades 7 and 8, were assigned to the later shift. Shift assignment can be a problem and guidelines in the United Federation of Teachers (UFT)

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[19]Delays in the construction of IS 218 and on going renovations at IS 52 reduced IS 52's effective capacity to 1,000 when enrollment was 1,500. Its normal capacity was 1,214.

OVERLAPPING SESSIONS USED BY DISTRICT 6

Twelve Session Schedule

	1	2	3	4	5	6	7	8	9	10	11	12
	7:15-8:00	8:00-8:45	8:45-9:30	9:30-10:15	10:15-11:00	11:00-11:45	11:45-12:30	12:30-1:15	1:15-2:00	2:00-2:45	2:45-3:30	3:30-4:15
EARLY SESSION •					Lunch	Lunch						
LATE SESSION •							Lunch	Lunch				

Eleven Session Schedule

	1	2	3	4	5	6	7	8	9	10	11
	7:15-8:00	8:00-8:45	8:45-9:30	9:30-10:15	10:15-11:00	11:00-11:45	11:45-12:30	12:30-1:15	1:15-2:00	2:00-2:45	2:45-3:30
EARLY SESSION •				Assembly	Lunch	Lunch					
LATE SESSION •				Assembly			Lunch	Lunch			

Figure 13

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contract must be followed.[20] Teachers that were assigned to the early shift eventually grew to prefer it to a traditional schedule. Conversely, many teachers that were assigned to the later shift did not like it because it conflicted with extracurricular activities, such as, continued education, second jobs and religious observance. Also, double shifting disturbed some teachers' transportation schedules.

Although double shifts significantly increase the capacity of schools, student education may suffer in both quantity and quality. Students lose one instructional period per day and cultural classes such as music, art and dance are cut because it costs more to operate two shifts. These cuts can be curtailed by a modest increase in the school budget to provide additional teachers and cultural programs. This extra cost is preferable to the large outlay of capital funds required by new school construction.

Although parents and teachers initially resisted the implementation of double shifts, they eventually cooperated. Some problems had to be overcome, such as:

- The school day can sometimes start and/or end after dark. Changes in the degree of overlapping have been used to resolve this problem.

- Older siblings are sometimes unable to provide afterschool care for younger ones because they are in separate shifts. The school can arrange after school activities for those children in the first session until

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[20]The UFT contract covering the years 1991-1995, dictates that teachers are to be rotated and that assignment is to be based on seniority.

the second shift is over.[21]

- The truancy rate may increase. Students in the higher grades are sometimes reluctant to come to school earlier than they are accustomed. Truancy caused by double shifting can be minimized by scheduling the older students for the later shift.

- The quality of the school environment may be affected when resources are stretched to cover two sessions. For example, security personnel must cover more school hours - thereby reducing security levels. Longer hours also mean more wear and tear on the physical plant. Furniture, doors, books, desks, etc. deteriorate more quickly.

At the high school level where overcrowding is most severe, city-wide, double shifting is widely used. For example, Newtown High School in Elmhurst, Queens, operates at 212% of capacity. It is the second largest school in the system with 4,639 students and 229 teachers. Newtown has been on double shift since 1966. It initially used split shifts, but it converted to overlapping shifts in the early 1980s and is still using overlapping shifts today.

The first session starts at 7:28 AM and the last session ends at 3:14 PM. Sometimes students come to school in the dark. Six of the 11 sessions scheduled per day overlap. Some older students at Newtown prefer to attend the earlier shift because many students have part-time jobs

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[21]Even though space to house after school activities is scarce, there is an improvement in space availability after double shifts are implemented because fewer students are accommodated in each shift.

in the afternoon. According to the principal, the major problem caused by double shifts at Newtown is decreased security. Because 6 of the 11 sessions overlap, students enter and exit the school buildings over an extended period during the day. This makes it difficult to ensure proper security at the school.

Each application of double shifting presents a unique opportunity to overcome a school's particular problems. It can be tailored to address the degree of overcrowding, the number of available rooms, grade level, etc.

Reacquiring Schools Given up in the 1970s

During the 1975 fiscal crisis, maintenance of school facilities was dramatically reduced, resulting in the deterioration of school buildings. Simultaneously, the school system was experiencing a gradual decline in enrollment. As a result, jurisdiction over 104 Board of Education buildings was transferred to other City agencies or approved for alternate uses. Many were sealed and remained vacant for many years and have deteriorated considerably. Some of the buildings were demolished. Over 58% of the buildings were built before 1910, with 28% built before 1900. A few of these buildings are recoverable. In some cases only the land is available as a potential site for a new school.

Only a few of the transferred buildings are located in the most overcrowded districts. Utilization in these districts has remained high over the years. However, there are some buildings that are located in districts adjacent to the overcrowded districts and may be of value in relieving overcrowding.

Year-Round School Calendar

The traditional nine-month school year evolved to accommodate growing and reaping seasons, permitting a three-month vacation during the summer to enable children to work on family farms.[22] Beginning at the turn of the century, a number of communities developed a year-round school calendar. The early year-round school plans were successful. However, these programs began to fade because of societal disruptions such as the Great Depression and World War II. In the 1970s, year-round education was reintroduced as a means to improve education. By the 1980s, the emphasis changed, and most school districts implemented year-round education to case overcrowding and to avoid the large capital costs of building new schools. The largest school district in the country currently using year-round education, the Los Angeles Unified School District, was forced to do so because of the failure of bond issue proposals and schools damaged by earthquakes.[23]

Year-round education involves the use of schools during the entire year. It does not, however, mean that students go to school all year. Year-round calendars can be either single or multitrack. A single-track system has all students in school or on vacation at the same time. Single-tracks do not increase a school's capacity. A multi-track system divides the students into different tracks and each track goes to school and has vacation at different times during the year. Year-round multi-track education can increase building capacity from 25% to 50%. This system

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[22]Los Angeles Unified School District Priority Housing program, Historical Overview, Operational Data and Summary of the Research on Year-Round Education, p.2, April 1987.

[23]Ibid, p. 3

has been implemented in numerous cities including Los Angeles, Dallas, Houston, Las Vegas and Denver.

There are different calendar options for year-round schools, depending on the degree of overcrowding. Some examples are given below.[24]

- 90/30 Plan (Figure 14)
  Divides school year into two 90-day terms, each separated by 30-day vacations.
  Students and staff are off during 10-day winter vacation: two tracks attend school in July and August.
  Requires 7 track rotations.
  Can increase capacity by up to 33 %.

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[24]Los Angeles Unified School District Common Calendar Task Force, Common Calendar Recommendation: Final Report, 1988, p.8-9.

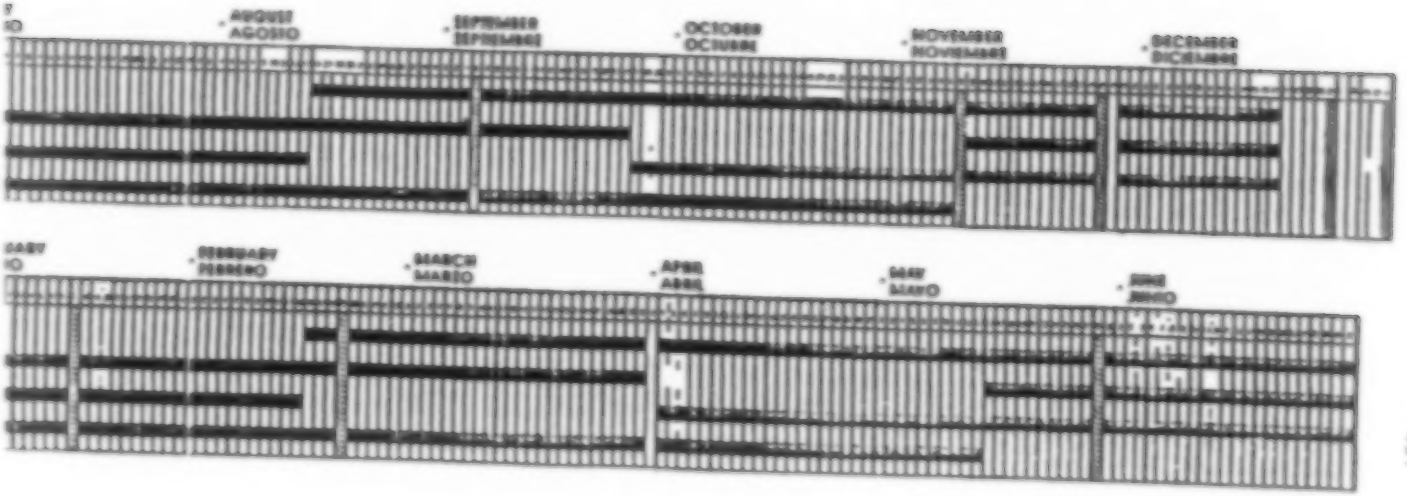
90/30

LOS ANGELES UNIFIED SCHOOL DISTRICT
DISTRITO ESCOLAR UNIFICADO DE LOS ANGELES

HOLIDAY
DIA DE FIESTA

YEAR-ROUND SCHOOL CALENDAR 1993-94

CALENDARIO ESCOLAR DE TODO EL AÑO 1993-94



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Figure 14

- 60/15 Plan
  Divides school year into approximately three 60-day terms; each followed by a 15-day vacation.
  Students and staff are off during a 10-day winter vacation and a 15-day summer break and three separate 15-day vacations.
  Requires 14 track rotations.
  Can increase capacity up to 25%.

- Concept 6 Plan (Figure 15)
  Divides school year into six terms of approximately 41 days each; students attend four of the six terms, but two must be consecutive, resulting in instructional blocks of 82 days each; vacation blocks are 41 days long. Students and staff are off during 7-day winter vacation: two of the three tracks attend school in July and August.
  Requires five track rotations.
  Provides 163 days of instruction instead of 180 days provided by other calendars, thus requiring longer school days and legislative approval.
  Can increase capacity by up to 50%.

- 45/15 Plan
  Divides school year into four 45-day terms, each separated by a 15-day vacation. Students and staff are off during a 10-day winter vacation; all groups in the multitrack plan have vacation in the summer, but not at the same time.
  Requires 15 track rotations and classroom chances for roving teachers of the various multi-track calendars.
  Can increase capacity up to 33%.

Some calendar options for year-round education, such as Concept 6, don't allow enough instructional days during the school year to satisfy New York State requirements.[25] This can be overcome, as it was in Los Angeles, by changing state law to reduce the number of school days to 163, while still allowing the same amount of instructional time. The State of California redefined the school year by minutes instead of days and allowed the extension of the school day by forty minutes.

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[25]New York State law requires that students have 180 instructional days in the school year.

CONCEPT 6
CONCEPTO 6

LOS ANGELES UNIFIED SCHOOL DISTRICT
DISTRITO ESCOLAR UNIFICADO DE LOS ANGELES

HOLIDAY
DIA DE FIESTA

YEAR-ROUND SCHOOL CALENDAR 1993-94

CALENDARIO ESCOLAR DE TODO EL AÑO 1993-94

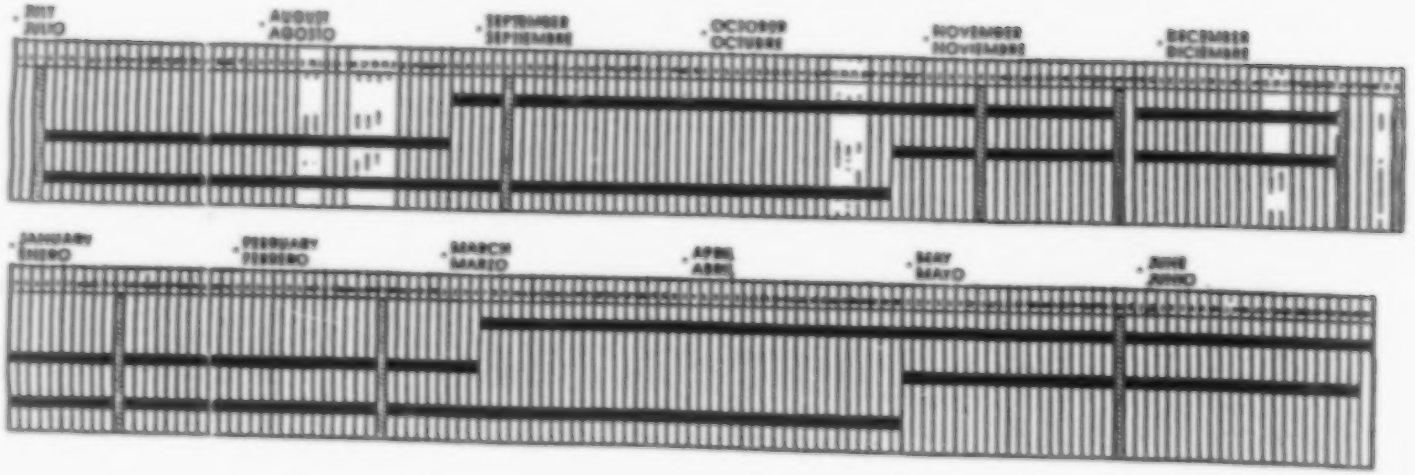


Figure 15

Advantages to Year-Round Education

The Los Angeles Unified School District reviewed studies of year-round education from school districts across the nation and concluded the following:[26]

- Attitude: teachers, students, parents, administrators and communities preferred year-round education after participating in it, but those on a traditional schedule had negative perceptions about year-round education and were reluctant to change.

- Student Achievement: There were no significant differences in student achievement between year-round education and traditional programs. Less review was required after the shorter vacations in year-round education programs.

- Student Behavior: There was a decline in vandalism, juvenile delinquency, and other disciplinary problems in year-round schools.

The New York City public school system would be faced with many barriers to the implementation of year-round education, as was the Los Angeles school district when it started in 1974. The greatest barrier will be the reluctance to end the tradition of summers without school. One of the first objections that can be raised against year-round schooling in New York is the lack of air conditioning in New York City school buildings. Although air

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[26]Los Angeles Unified School District Priority Housing Program, Historical Overview, Operational Data and Summary of the Research on Year-Round Education, p. 22, April 1987.

conditioning is being installed in all new and modernized school buildings (most of this construction is taking place in overcrowded districts where the need is greatest), this still represents only a handful of schools. This problem could be overcome by air conditioning the schools on a room by room basis. Not all schools would need to be air conditioned, only those operating on a year-round calendar. This approach would be substantially less expensive than building new schools. In the City's FY 94-98 Capital plan, presented in February, 1994, $390.2 Million was set aside for air conditioning retrofit, specifically to allow schools to be used for year-round education.[27] But after the cuts to the capital program only $6.1 million is now earmarked for air conditioning retrofit.[28]

Addressing Major Community Concerns

School districts that have implemented year-round education have discovered some of the most pressing community concerns which are outlined below.[29]

- Extra-curricular activities: Year-round schools continue to provide sports and other extracurricular activities. Students on vacation when seasonal activities are taking place can still participate.

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[27]City of New York, Financial Plan, Fiscal Years 1994-1998, Vol I.

[28] Board of Education, Five-Year Capital Plan, Fiscal Years 1995-1999, November 16, 1994.

[29]Board of Education, Five Year Capital Plan, Fiscal Years 1995-1999, November 16, 1994

- Siblings at different schools: When children from the same family attend different schools, every effort must be made to place them on the same or similar schedules.

- Child care/Family life: Parents need to know several months in advance before a school switches to year-round education. This time is needed to parents to make new child care arrangements and by providers to adjust to new demands. Families will have the opportunity to take vacations at other times besides summer.

- Camping and recreation: The school districts and the Board of Education must work with parks, recreational and cultural agencies to provide activities throughout the year.

- Youth Employment: When all the students are on vacation in the summer, part-time jobs are sometimes difficult to get. If vacations are more evenly distributed over the year, students should find jobs more easily.

AGENCY'S COMMENTS

The BOE basically agreed with our findings and recommendations. BOE indicated that it has been pursuing many administrative solutions in addition to capital expansion which it says is not adequate for the existing or anticipated level student overcrowding. We have incorporated their comments where appropriate. The full text of their response is found in the Appendix.

CONCLUSIONS AND RECOMMENDATIONS

BOE and the school districts that are faced with overcrowding have developed a wide array of solutions, ranging from the most expensive and permanent: building new schools, to creative administrative solutions, such as moving the 5th and 6th grades from overcrowded elementary schools to underutilized middle schools. While the solutions are commendable, increasing enrollments make these solutions insufficient.

The Board of Education is currently reviewing recommendations made by its Redistricting Advisory Study Group. The recommendations call for major changes to school districts in the Bronx and in Queens. While redistricting has great potential to improve overcrowding conditions, the changes, as proposed will have minimal impact on overcrowding. Restrictions stemming from geography and other local factors make it impossible to take advantage of redistricting's full potential.

The problem of overcrowding is getting worse in many of the most overcrowded districts, with limited relief from the last five years of capital and administrative solutions. It is driven by large waves of immigration and a higher number of births in the overcrowded districts. In fact, the school system is growing at the rate of one large school district, or over 21,000 students per year. In the BOE 10-year planning horizon, immigration rates and overcrowding levels are expected to keep increasing. Virtually all districts will experience enrollment growth.

Some districts will find it impossible to solve the current and projected overcrowding if changes are not made in the way the districts and the central board approach the

problem. The borough of Queens, and Districts 24 and 29 in particular will experience the highest levels of overcrowding. The operational budget as well as the capital budget is shrinking - in a time of dramatically increasing enrollments, therefore, the traditional perspective used to solving the problem in the past, i.e. building new schools, must change. Imaginative district-wide solutions must be found. Other school districts around the country have faced the problem that New York City now faces and have overcome it through innovative change.

These solutions will require adjustment on the part of students, teachers, parents, administrators, service providers and the community at large. Many lessons gained from the experience of District 6, the high schools and other overcrowded districts can be harnessed by the BOE and applied on a City-wide basis. Some of these recommendations are outlined below.

- BOE should implement a program to study and evaluate the efforts of District 6 and the high schools, over the last decade, so that the information can be used to design programs to alleviate the overcrowding city-wide. District 6 has been innovative in busing students to other districts as well as implementing successful double shifts at the elementary and middle school levels.

- The BOE should establish year-round multi-track education in the districts that are overcrowded and are growing faster than capital or administrative solutions can be found. School capacity is increased with year-round schooling because the schools are used by alternating groups or tracks of students the entire year. Schools on year-round education must

be air-conditioned for summer use and should be identified immediately. Air conditioning may be done on a room by room basis, or where necessary, the entire school may have to be retrofitted. Although we recognize that some capital funds will have to be expended for projects already under construction, the limited capital funds for planned new construction can be better spent on air conditioning the schools to allow year round education.

- The Mayor's Office of Labor Relations should begin immediately to negotiate to resolve any issues with the United Federation of Teachers, the Council of Supervisors and Administrators, other affected unions and all other organizations that may be affected by the change to year-round education.

- Old schools should be modernized and new schools should be constructed to allow use by different grade levels. For example, new buildings should be designed with a layout that permits use by middle and high school students. The lines of distinction between elementary, middle and high schools are being blurred by the need to move grades between the different levels and to have a more flexible grade structure in response to changing patterns of overcrowding. BOE has begun to experiment with new high school construction that allows middle and high school students use. However, modernized high schools and middle schools should be modified similarly.

- Where necessary, busing should be used to transfer students to schools within a district as well as schools

in other districts. In severely overcrowded districts such as District 24, in Queens, where there is limited underutilized space, busing to a distant district should be considered. Magnet schools could be established with special programs to attract parents and students. Also District 24 could establish annexes to its own schools in available buildings in surrounding districts.

- Double shifting should be considered as a solution for schools with severe overcrowding and in need of an immediate solution. PS 19 and PS 89 in District 24 at 133% and 147% capacity respectively are examples of such schools to be considered. Additional funds need to be provided for the incremental increases in the operating costs incurred when a school goes to double shifts.

APPENDIX 1

BOARD OF EDUCATION'S RESPONSE

BOARD OF EDUCATION OF THE CITY OF NEW YORK
December 16, 1994

The Honorable Alan G. Hevesi
Comptroller, City of New York
1 Centre Street
New York, NY 10007

Re: Office of Policy Management's Draft Report: Overcrowding in New York City Public Schools

Dear Comptroller Hevesi:

Enclosed are the Board of Education's comments on and responses to the above mentioned report.

I am pleased to note that your office's report on overcrowding in the New York City Public Schools supports the Board of Education's analysis of and efforts to alleviate the escalating problem with overcrowding within the school system. As you are aware, I have established the Citizens Commission on Planning for Enrollment Growth to study many of the issues addressed in your report. The Commission is expected to issue their recommendations in mid-January of 1995.

Many creative solutions are being studied and implemented to increase the school system's capacity level. In this climate of drastic budgetary reductions, we must redouble our efforts in seeking solutions to seemingly intractable problems. Solutions and aid must come from all sources, within and outside of the city. Your report will help to alert citizens and public officials to the needs of the school system.

In the final analysis, all of us must continue to work for the benefit of our students and provide them with the resources and means to become educated and productive residents.

Sincerely,

Ramon C. Cortines
Chancellor

RCC:mk
Enclosures

C: Jeanne Millman
Donald McCabe
Beverly Hall
Lynne Savage
Barry Sullivan
Robert Buxbaum
James Coney
John Ferrandino

BOARD OF EDUCATION OF THE CITY OF NEW YORK

Reference No. 1994-286

December 6, 1994

MEMORANDUM

TO: James R. Coney
Auditor General

FROM: Robert Buxbaum
Chief Executive for School Facilities

SUBJECT: Response to NY City Comptroller's Office of Policy Management's Draft Report Entitled "Overcrowding in New York City Public Schools: Where to We Go From Here"

The Comptroller's Office report summarizes most of the problems the Board of Education presently faces in dealing with school overcrowding. In these times of severe fiscal constraints, the BOE is being challenged to be as creative as possible in remedying this situation. The 1995-99 Five Year Capital Plan earmarks 36% of funds for increasing capacity levels. However, the $809 million required for either the present number of students or the anticipated influx of students in the coming years.

For its part the Division of School Facilities has focused its efforts on a number on a number of initiatives in conjunction

with other BOE divisions. These activities include:

Working with the School Construction Authority to speed up the opening of new schools currently under construction in overcrowded districts to reduce utilization rates; especially at the elementary school level. The 1995-99 Five Year Capital Plan commits $644 million for construction of 18 new schools, 5 building additions and 2 school renovations providing 16,250 seats.

Expanding the number of lease acquisitions during Fiscal Year 1995 to support Vision or thematic programs for schools. In addition, new leases to move district offices from schools into offsite locations; thus freeing up space for additional classrooms, are presently being negotiated. However, due to cutbacks in the capital plan, funding will not be available after Fiscal Year 1996 to acquire and renovate additional new leases.

As part of the Five-Year Capital Plan, School Facilities is working with the School Construction Authority to acquire 180 portable classroom units which will provide 8,900 seats. These portable units will give the BOE the flexibility to shift classrooms to schools experiencing overcrowding, on an as needed basis in as little as a 6 month time frame. Although they are temporary in nature, and not fully integrated with the main school buildings, they provide a viable, short term alternative to more costly capital construction.

Spending $16 million over the next 5 years to increase the partitioning of special education

classrooms to free-up additional space for standard classroom use.

The two recommendations regarding busing to underutilized districts and year-round schooling are important policy initiatives which could impact favorably on the Board's space needs. However, since these initiatives would have a wide ranging effect on how education services are delivered in this City, the Division defers to the Central Board for an official policy stance.

The auditors recommend that old schools should be modernized and new schools designed and constructed to allow for use by different grade levels. Our capital program calls for construction of new facilities in those districts and for school grades most in need of additional space.

In general, the interior modernizations currently under way are necessary to bring older, mostly elementary schools to a state of good repair. These modernizations are designed to upgrade mechanical and electrical systems and will not, in most cases, add substantially to increasing capacity levels. The new facility construction projects underway now will reduce some of the congestion in the overcrowded districts for certain grade levels.

The Board is experimenting with a "Secondary Collaborative" initiative which will incorporate high school grades into middle school facilities. This can be accomplished because many of the junior high school student programs and building requirements are close to high school building and student requirements. There are some questions of mixing certain lower grade levels with a high school population which school districts need to resolve. In

addition, middle school grades can and are being adjusted presently to incorporate lower and or higher grades as necessary to maximize existing space.

In general, the Division agrees with the report findings and many of the suggested proposals for remediation of the space crisis. In fact, many of the administrative steps which have been implemented by numerous community school districts to relieve overcrowding were the direct result of the specific recommendations contained in School Facilities' Annual District Space Analyses which is given to the school districts for their information and use.

Thank you for the opportunity to respond to this report.

RB: RM: pl

C: Mark David
Cheryl Francis
Joseph Nappi
John Fratangelo
Kathleen Gallo
Robert Meeker
File

BOARD OF EDUCATION OF THE CITY OF NEW YORK

MEMORANDUM

November 28, 1994

TO: JAMES R. CONEY

FROM: Beverly L. Hall

SUBJECT: Recommendations: New York City Comptroller's Report on School Overcrowding

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The report suggests short and long range solutions to overcrowding in the New York City Public Schools that will have varying degrees of impact.

The Board of Education must strive for 100% utilization in the districts that are underutilized but there will be parental resistance to busing across district lines especially from districts with high student achievement to districts whose schools are not doing as well.

Regardless of fiscal concerns and time, plans must be made to develop and construct new schools in the

areas with greatest needs. The City should explore the feasibility of getting more corporations and developers to partially or completely build new schools in exchange for City approval of their projects and/or tax breaks.

Multi-track year-round schools should not be implemented without the support of the parents.

BLH:jf

BOARD OF EDUCATION OF THE CITY OF NEW YORK

MEMORANDUM

November 22, 1994

TO: James R. Coney

FROM: John J. Ferrandino
Supervising Superintendent
Division of High Schools

SUBJECT: New York City Comptroller's Draft Report on School Overcrowding

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As you requested, the Draft Report on School Overcrowding was reviewed by several staff members within the Division of High Schools. Their comments and recommendations are detailed by page below.

If you have any questions or need further information, please contact Sharon Rachelson at extension 3458.

Page	Comment/Recommendation
ES 2	The solution to build new schools is

not being implemented because of the cut in capital funds. The footnote refers to a downturn in enrollment. High School enrollment has increased over the last several years and the Division of School Facilities has projected this trend to continue for several years.

ES 3 — Year round education requires that buildings be air conditioned, union contracts be renegotiated and it will also result in more students being out on the streets. Summer School would also be impacted.

ES 4 — When new high schools are constructed, the designs permit the use of space by middle and high school students.

5 — The Five Year Capital Plan was cut 3.4 billion dollars. They refer to overbuilding during high enrollment periods and then eliminating school buildings in times of underutilization. This was never the case with high schools.

8 — No estimates given for high schools.

18 — High school figures are not accurate. Why are they using 92-93 school year?

20 Lunch rooms are usually not expanded for high school modernizations. Loss of space occurs for science labs, computer labs, etc.

21 1991 utilization figures used. This is old data.

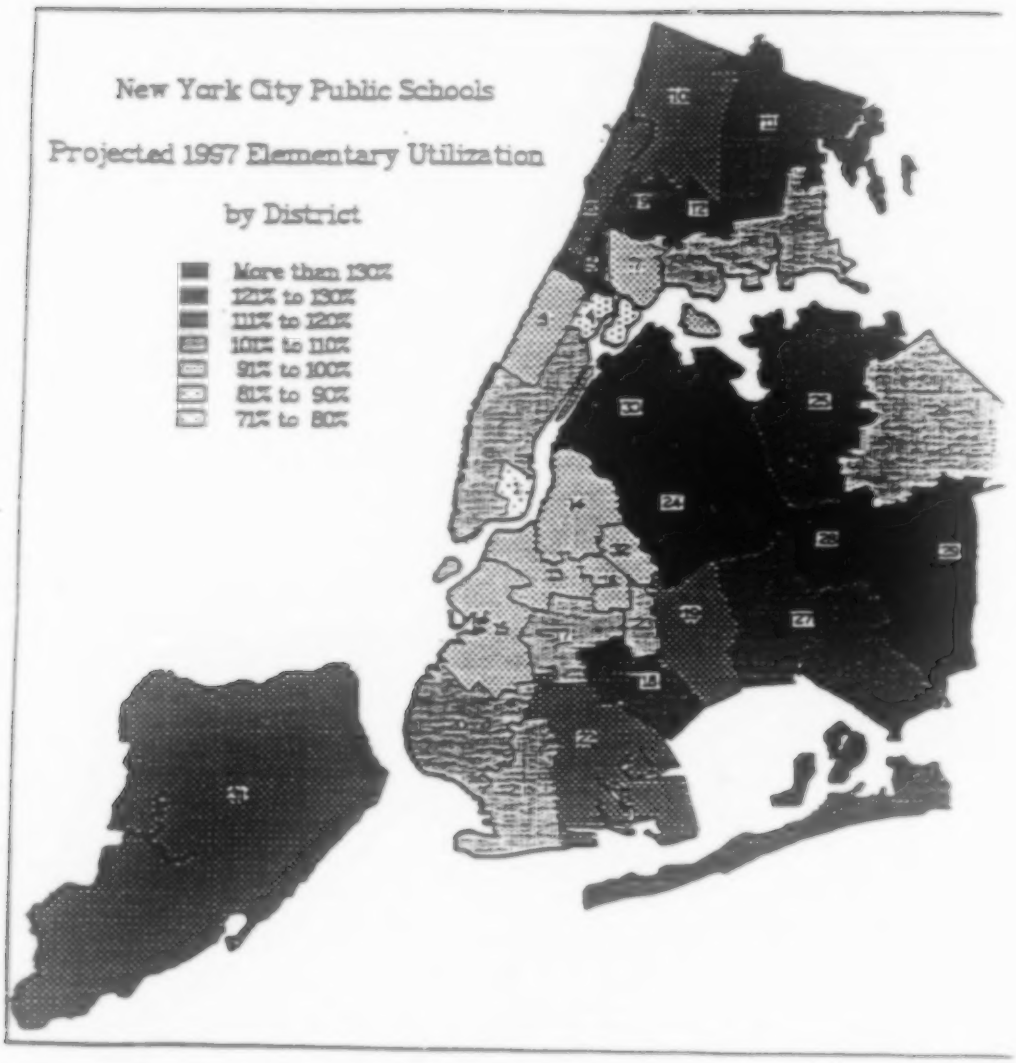
22 1993 audited enrollments were available when they issued this draft.

43 High schools do not have assembly. Gym classes and lunch cannot handle all students in overlapping shifts.

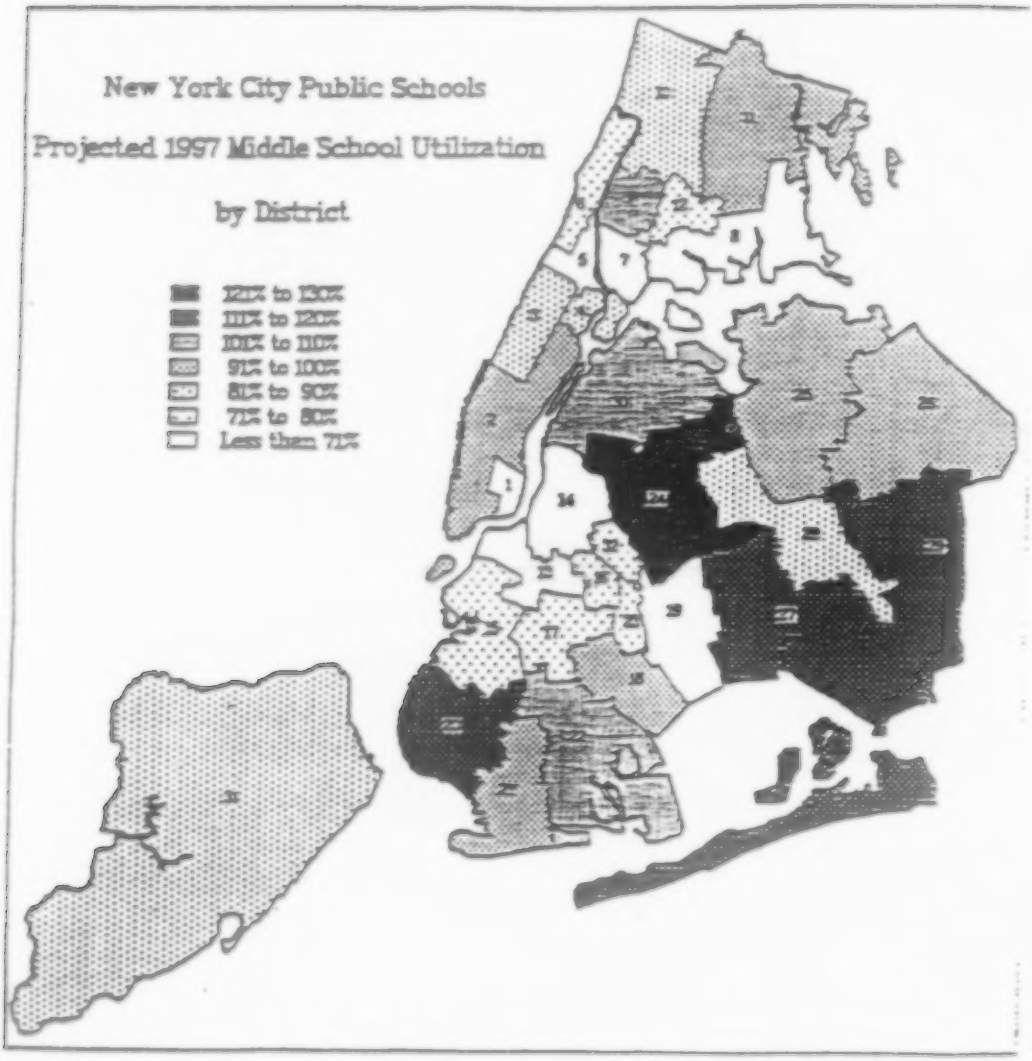
47 Double shifts require an increase in the budget given to schools for administration. Also, school safety would need additional safety officers. In addition, extracurricular activities would be more difficult to offer since we would no longer have the traditional "after school" time.

50 Switching to year round schools would require further study. Schools would also need to be air conditioned.

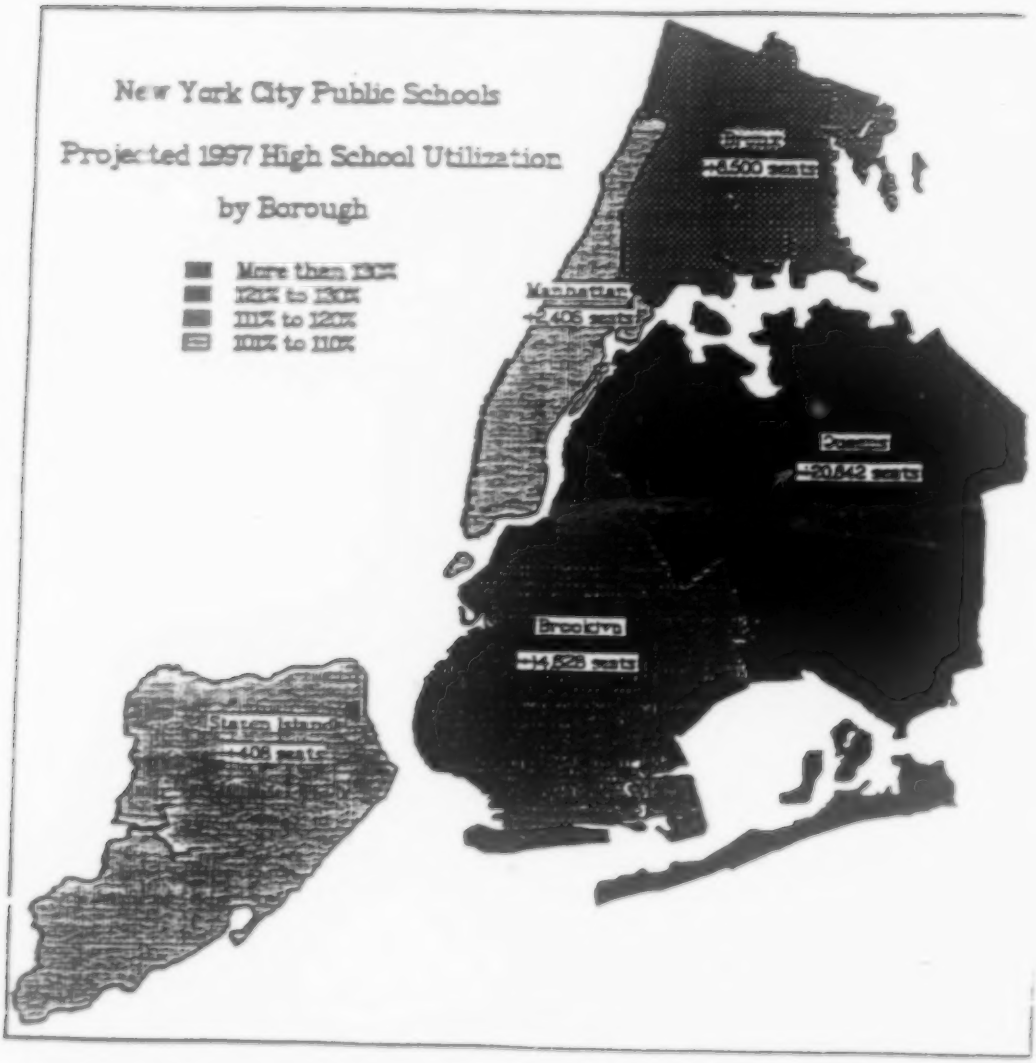
52 Air conditioning is installed in new buildings, but not in modernized facilities.



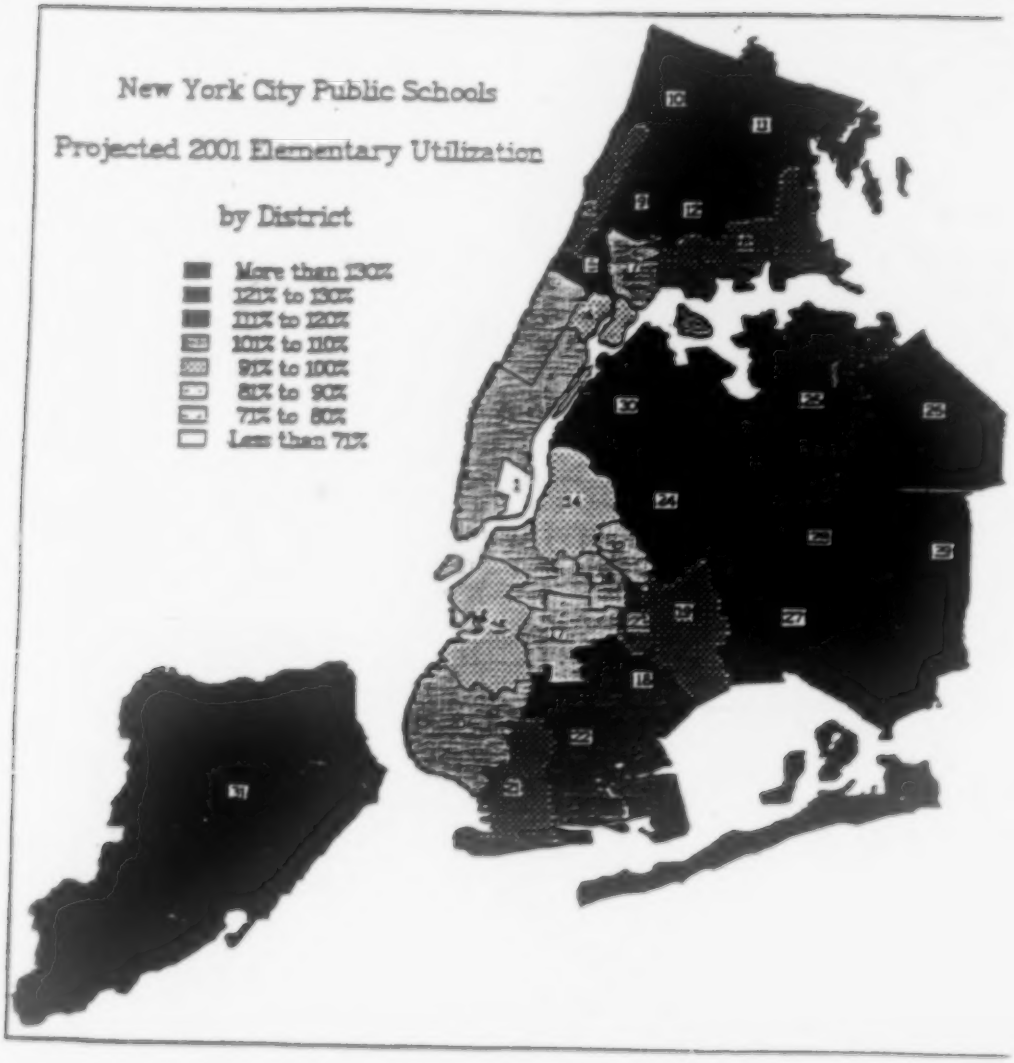
Source: New York City Board of Education, Year 2003 Master Plan, April 28, 1993, p.51



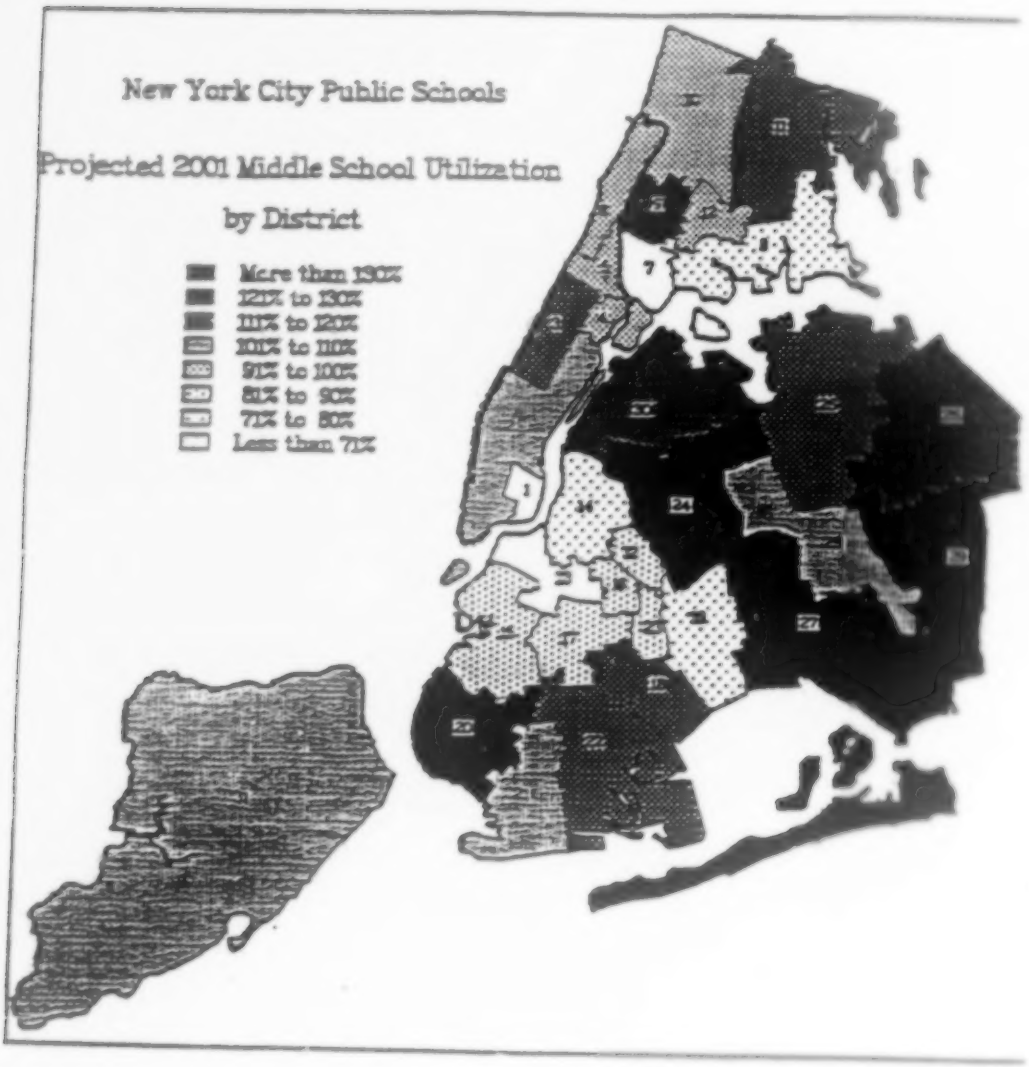
Source: New York City Board of Education, Year 2003 Master Plan, April 28, 1993, p.52.



Source: New York City Board of Education, Year 2001 Master Plan, April 28, 1993, p.83.

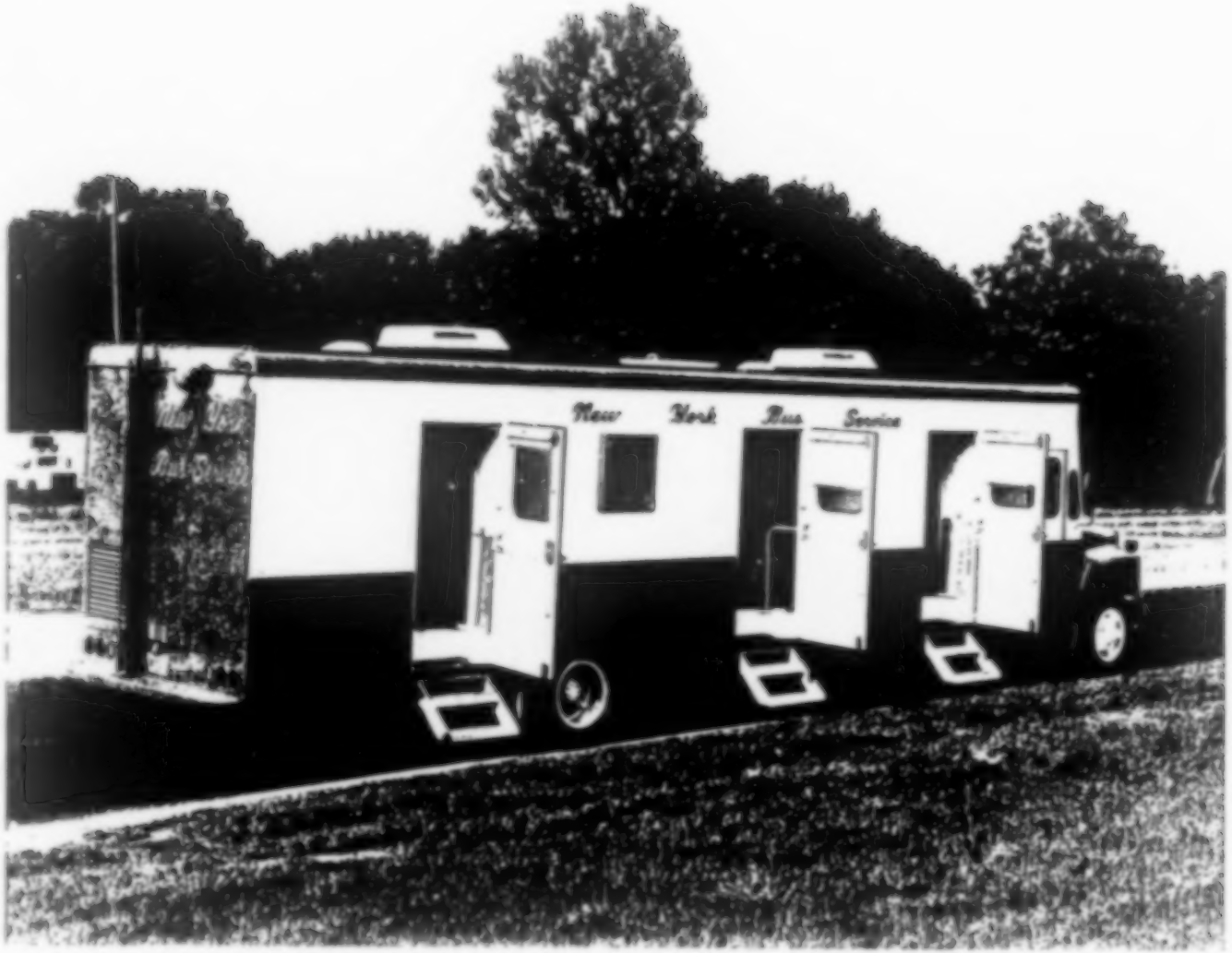


Source: New York City Board of Education, Year 2003 Master Plan, April 28, 1993, p.66.



Source: New York City Board of Education, Year 2001 Master Plan, April 28, 1993, p.67


New York Bus Service
New York Bus Service


New York Bus Service



ADDITIONAL GUIDANCE ON AGUILAR v. FELTON AND CHAPTER 1 OF THE EDUCATION CONSOLIDATION AND IMPROVEMENT ACT (ECIA) QUESTIONS AND ANSWERS

June 1986

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24. Question: What are the requirements for consultation with private school officials?

Answer: Section 200.70 of the Chapter 1 regulations states that the LEA shall provide services to children enrolled in private schools "in consultation with private school officials."

25. Question: When should this consultation take place?

Answer: The LEA should first consult with private school officials before making any decision that significantly affects the opportunities of private school students to participate in the project. Therefore, consultation should take place before the LEA designs a plan to serve private school students. Consultation should then continue at appropriate stages throughout the term of the project.

26. Question: Should this consultation include discussion regarding the method the LEA will use in serving private school students?

Answer: Yes. While the LEA has final responsibility for deciding how and where services will be provided consultation with private school officials should be an integral part of making those decisions.

27. Question: At what stages during the term of the project is consultation appropriate?

Answer: Consultation should occur before important

decisions are made on the project, including when determinations are made concerning -

1. which children will receive benefits;

2. how the children's needs will be identified;

3. what services will be offered;

4. how and where those services will be provided; and

5. how the project will be evaluated.

A unilateral offer of services by the LEA with no opportunity for discussion is not adequate consultation. To ensure that proper consultation and offers of equitable services are documented the use of a form detailing the consultation and offers, with a place for the signature of private school officials may be useful.

28. Question: Can Chapter 1 instructional personnel consult with private school personnel?

Answer: Yes. Chapter 1 teachers and other instructional personnel can consult with instructional staff from the private school in order to coordinate the Chapter 1 program with the regular classroom instructor and to facilitate the success of the services provided. Such consultation should not occur at the site of the Chapter 1 services while the services are being provided. To the extent practicable, the LEA may wish to have this consultation occur at a public

school site, other neutral sites, or by telephone.

29. Question: May LEAs use mobile vans or other portable units to provide Chapter 1 services to children enrolled in religiously-affiliated private schools? If yes, where may an LEA place a mobile or portable unit?

Answer: Yes. The use of mobile or portable units for the provision of Chapter 1 services to private school children is allowable. In deciding where to place a unit LEAs should be aware that the Supreme Court has previously held that the Establishment Clause of the First Amendment is not violated when units are located on public property near the private school. See Wolman v. Walter, 433 U.S. 220, 246-47 (1977). Such locations, as well as other locations not owned by the private school or a religious organization are plainly acceptable sites for mobile or portable units.

The Court has not ruled on the constitutionality of placing a mobile or portable unit on property belonging to a religiously-affiliated private school and there may be differing views on this subject. Given existing case law, it is the view of the Department of Education that, under certain circumstances mobile or portable units may constitutionally be placed on such private school property.

The Department of Education believes that the courts would approve delivery of services in locations on private school property that fit the Supreme Court's characterization of the site that it found acceptable in Wolman v. Walter, i.e., a site "neither physically nor

educationally identified with the functions of the nonpublic school." While the Court has not held that other locations are constitutionally impermissible, we believe that services at locations fitting this characterization are most likely to withstand judicial scrutiny. The Department of Education believes that one way in which the use of a mobile or portable unit at a given location on the property of a religiously-affiliated private school will comport with this standard is if the following conditions are met:

1. The property is at a sufficient distance from the private school buildings so that the mobile or portable unit is clearly distinguishable from the private school facilities used for regular (non-Chapter 1) instruction.

2. The mobile or portable unit is clearly and separately identified as property of the LEA and is free of religious symbols.

3. The unit and the property upon which it is located are not used for religious purposes or for the private school's educational program.

4. The unit is not used by private school personnel.

In addition to the conditions stated above, an LEA may find that following two further guidelines may bolster its decision to locate units on the property of a religiously-affiliated private school:

1. Before placing a unit on private school property, the LEA can determine that other locations for the services are unsafe,

impracticable, or substantially less convenient for the children to be served.

2. The public school district could enter into a lease arrangement with the private school for the use of the land owned by the private school upon which the unit is to be sited.

30. Question: What are some examples of property owned by a religiously-affiliated private school that would meet the above criteria?

Answer: Such property might include:

1. Land near the school that is separated from the school by an undeveloped plot of land or other terrain features and that is used neither for religious purposes nor for the school's educational program.

2. A portion of a private school playground that is fenced in and has direct access to a public street.

3. Those portions of a parking lot that are not immediately adjacent to the private school.

31. Question: May a religiously-affiliated private school building be used as a power source for a unit?

Answer: Yes. There is nothing to prohibit public schools from arranging for power from any source. However, care must be exercised in the placement of the unit to make certain that the unit is separate from the private school building. If the use of the power

source results in the need for repair, remodeling or construction of private school facilities, Chapter 1 funds may not be used for such repair, remodeling or construction. (See 34 C.F.R. § 200.75).

32. Question: May the LEA pay the private school with Chapter 1 funds for the power or for leasing property?

Answer: Yes. The private school, however, may not charge more than a reasonable amount as determined under local conditions.

33. Question: Who is responsible and liable for the safety of private school children during the time they walk or ride to a neutral site to be served by the Chapter 1 program?

Answer: Generally the LEA is responsible for providing for the transporting of these children to a neutral site. The question of liability, however, would be determined in accordance with state and local law and would depend on the specific facts of the situation. Any increased cost to the LEA for having liability insurance coverage may be charged as an administrative cost to the Chapter 1 program.

34. Question: What can a small rural LEA with a small Chapter 1 allocation do to provide equitable services consistent with the Felton decision?

Answer: Rural LEAs may have special problems due to small allocations and large distances between the private schools and available locations for providing Chapter 1 services. The LEAs may wish to consider

leasing rather than purchasing equipment, renting a neutral site or using home tutoring components to provide equitable services. They may also wish to set up a joint project with neighboring LEAS, and submit a combined application.

35. Question: May equipment be placed an the premises of a religiously-affiliated private school to provide computer assisted instruction (CAI) under Chapter 1 to eligible children enrolled in the school?

Answer: Yes. CAI may be provided with equipment placed on the premises of a religiously-affiliated private school under certain circumstances. We believe that such a placement will withstand judicial scrutiny if the following criteria are met:

1. As with all Chapter 1 programs serving private school children, the CAI program must be under the LEA's direction and control. On-site review by public school officials must be limited, however, to such things as the installation, repair, inventory and maintenance of equipment.

2. Private school personnel may be present in CAI rooms to perform limited non-instructional functions such as to maintain order, to assist children with equipment operations (such as turning the equipment on and off, demonstrating the use of the computers, and accessing Chapter 1 programs), and to assist with the installation, repair, inventory and maintenance of the equipment.

3. Neither public nor private school personnel may assist the students with instruction in the CAI room. Public school personnel may however, assist by providing instruction through computer messages, by telephone, or by television.

4. Access to the computer equipment and the rest of the program must be limited to Chapter 2 eligible children.

5. Equipment purchased with Chapter 1 funds may not be used for other than Chapter 1 purposes. Only software directly related to the Chapter 1 program may be used with the CAI.

36. Question: Does CAI by itself meet the equitability requirements of Chapter 1?

Answer: Under the Chapter 1 statute, eligible private school children must receive services that are equitable in comparison to the Chapter 1 services provided to public school children in terms of both the quality and the costs of the services. When both public and private school children are receiving the same CAI service, the equitable services requirement of Chapter 1 is met. When CAI is being provided to private school children while public school children are receiving direct instruction from a teacher, the question of equitability is more difficult. This may be especially true in a year after the computers were purchased since, after the initial purchase of equipment CAI normally provides services at a cost less than the typical Chapter 1 program. (This

problem may not exist, however, if the cost of the equipment is spread out over a number of years. (See Question 37.))

Whether the services provided by an LEA to private school students are equitable to those provided to children in public schools is measured by factors discussed in question 12 of the August 15, 1985 guidance issued by the Department, such as whether the private school children's needs are addressed on the same basis as public school children, whether the services cost about the same, whether the opportunity to participate is about the same, whether the services are relatively convenient, and whether the quality of the services is comparable. If the CAI alone does not provide this equity, the LEA may make up the difference by offering additional services, such as tutorial centers or appropriate summer school programs. Of course, private school children may choose to participate in only a portion of the services offered, and the offer may still be considered equitable.

37. Question: May the cost of purchasing a computer be spread out over a period of years for the purpose of meeting the equitable costs requirement?

Answer: The cost of a computer may be spread over a period of years by such means as leasing the equipment, arranging for a lease-purchase agreement or by paying for the equipment in installments. The LEA may also buy the equipment with local funds, and at the time of purchase agree to have the Chapter 1 program proportionately reimburse the local funds each year.

38. Question: What is the effect of the guidance in these questions and answers on possible audit exceptions?

Answer: This guidance deals with extraordinarily difficult issues, including complex issues of constitutional law. Therefore, Department officials responsible for issuing final audit determinations do not intend to issue audit determinations to disallow expenditures consistent with the interpretation of Felton set forth in this guidance and the guidance issued on August 15, 1985, or consistent with another reasonable reading of Felton and other Establishment Clause cases. If there is a definitive ruling on any of these issues at a future date, the Department's audit policy may change with respect to expenditures made after that time. In the event this occurs, the Department will notify grantees accordingly. Nothing in this answer, however, in any way excuses an LEA or SEA from fully complying with applicable statutes and regulations, including the Chapter 1 equitable services requirement.

NEW YORK CITY PUBLIC SCHOOLS

Joseph A. Fernandez
Chancellor

Neutral Site - 1
1990-1991

Guidelines - Staff Assigned to Neutral Sites
September 1990

1. *Scheduling Students' Instruction*

Instructional Program

The instructional program for all schools should begin during the week of October 1, 1990 in the neutral site.

For those students who will be bussed between the nonpublic school and the neutral site for instruction, a matron will provide supervision for the children while they are traveling between schools.

All groups should be scheduled for 45 minutes of instruction when appropriate between the hours of 9:10 a.m. and 2:15 p.m. (See Attached Proposed Schedule for Shuttle.)

In order to minimize the number of times per week the students will be transported between the nonpublic

school and the neutral site, whenever possible the following guidelines should be implemented:

Schedule students for two sessions of instruction within your program.

If a student receives a combination of services, i.e., Corrective Reading and Corrective Mathematics and/or Corrective Mathematics and English As a Second Language, schedule these students for one period of reading followed by mathematics, etc.

The schedule for teachers who are assigned to neutral sites is 8:40 a.m. to 3:00 p.m.

The schedule for guidance counselors who are assigned to neutral sites is 8:30 a.m. to 3:00 p.m. with one-half hour lunch period.

The schedule for school psychologists and school social workers assigned to neutral sites is 8:00 a.m. to 3:10 p.m. with one-half hour lunch period.

2. *Consent Forms*

Staff is to maintain a listing of names of nonpublic school students for whom there is a consent form on file in the nonpublic school. It is not necessary to retain the actual consent form in your file. In addition, a copy of this listing is to be submitted with teacher's Groups and Programs.

3. *Teacher Attendance*

If a teacher will be absent he/she must call the

Coordinator's office by 8:00 a.m. and the nonpublic school to which he/she is assigned.

If you are aware of an absence in advance, please notify your program coordinator and the nonpublic school principal.

4. *Reporting Accidents*

In the event of an accident to a nonpublic school student while on the premises of the neutral site, notify the nonpublic school principal immediately as well as the Director's office.

In the event of an accident to a Central Chapter 1 staff member, notify your Chapter 1 office immediately.

5. *Timekeeping Procedures*

Staff assigned to neutral sites only will record their attendance on a daily basis on a time sheet. Time sheets are to be submitted to your coordinator on the last working day of each month.

In certain instances, staff may have a split assignment, i.e., public school and neutral site. Staff who are assigned on this basis will submit both a time card (if required) and time sheets on the last working day of each month to your program coordinator.

If the public school to which you are assigned no longer requires the Chapter 1 teacher to clock in and out, you will follow the school's procedure and fill in

your timesheet to reflect the exact time of arrival and departure.

6. *Safety Procedures*

In order to ensure the safety of the Chapter 1 staff and students, no unauthorized and/or unidentified visitors may enter the neutral site classrooms until clearance is obtained from the central office.

All emergencies should be reported by telephone to the nonpublic school principal and your Chapter 1 coordinator office by the Chapter 1 staff.

Doors are to be closed at all times.

Students are never to be left unsupervised.

7. *Fire Drills*

Rules and regulations will be reviewed by the Fire Drill coordinator who has been assigned to your site. If you have any questions, please call your coordinator.

8. *Paraprofessionals*

If you have a central program paraprofessional assigned to your school, please obtain from your coordinator a copy of the paraprofessional guidelines.

9. *Aguilar V. Felton*

As previously stated, please be reminded that, in accordance with the Aguilar v. Felton decision staff

is prohibited from providing teaching or counseling services on the premises of religiously-affiliated schools.

10. *Instructions for Completion of Payment Authorization for Shuttle Service (See Attachment) [Chart omitted]*

Instructions for Completion of Payment Authorization for Shuttle Service

The Payment Authorization for Shuttle Service is a three part form. It is kept on the bus for the Chapter 1 teacher to make an entry each time the bus leaves children at the public school/neutral site.

Contractors enter the following information on the first days of service each month:

- *district number*
- *name of nonpublic school*
- *name and address of public school/neutral site*
- *contractor's name*
- *run number*
- *month service is being delivered*

Teachers enter the following information on a daily basis:

- *date*
- *appropriate symbol to denote bus action*
- *initials (upon arrival of the last session)*

Teachers enter the following information on the last school day of the month:

- *the total number of days serviced*
- *your signature and the date*

Teachers should retain the last copy of the form for their records.

Contractors will be left with two copies of the form. The top copy of the form is to be forwarded to the Office of Pupil Transportation with the Official Invoice for Shuttle Service. The remaining copy is for the contractor's records.

NEW YORK CITY PUBLIC SCHOOLS

Joseph A. Fernandez
Chancellor

Guideline #1

Guidelines For Staff Assigned to MIUs
1990-1991

Time-Keeping Procedures

Time sheets will be used to record attendance. In certain instances, staff may have a split assignment, i.e. public schools and MIU or CAI and MIUs. Staff who are assigned on this basis will submit one time sheet on the last working day of each month to the program coordinator.

Reporting Teacher Absence

Each staff member is to notify his/her program office no later than 8:15 a.m. on the day of absence. In addition, please notify the nonpublic school principal so that groups scheduled for instruction on that day can be canceled. DO NOT CALL NEW YORK BUS SERVICE.

If you are aware of an absence in advance, please notify

your program coordinator and the nonpublic school principal.

Time Schedule & Testing Procedure

In most instances, MIUs will report to the nonpublic school location on Wednesday, September 5, 1990. However, if a nonpublic school is not scheduled to receive service on a Wednesday, the MIU will report on the first day of scheduled Chapter 1 services.

Staff will administer their diagnostic testing program in the MIUs after students have been oriented to the new setting. However, in some instances in order to facilitate the testing program and where there is a large room available, testing may be conducted in the MIU and in the nonpublic school.

Scheduling For Instruction

Most groups will be scheduled for 45 minutes of instruction with the exception of 60 minute periods that have been scheduled for some of the MIU sites.

In order to minimize the number of times per day or per week the students will leave the building, whenever possible the following guidelines should be implemented:

> *For those students who receive a combination of services; i.e., Corrective Reading and Corrective Mathematics and/or English As a Second Language, schedule these students for one period of reading followed by mathematics, etc.*

Teachers should be adaptable and arrange their conference

periods among themselves to avoid conflicts.

Priority for the utilization of the guidance area is for Clinical and Guidance Services, i.e., guidance counselor, psychologist, and social worker. (When assigned)

Conference/Preparation Periods

In a few instances, staff assigned to MIUs will report to the nearest public school for their conference/preparation periods. Please note that lunch hours cannot be scheduled for the first period or the last period of the day. Public school principals will be notified as to the specific days and times that Chapter 1 staff will be reporting in order to complete assignments relevant to Chapter 1 nonpublic school matters.

When applicable, staff will leave their time cards in the rack provided in the public school office so that the principal will be aware that you are in the building. You will remove the time card when you leave the building.

Consent Forms

Staff is to maintain a listing of names of nonpublic school students for whom there is a consent form on file in the nonpublic school. It is not necessary to retain the actual consent form in your file.

Escorting Students

Please be reminded that students are to be met at the outside

entrance to the nonpublic school by the MIU driver or the Chapter 1 staff who will escort the students to the place of instruction. Staff is not to enter the nonpublic school in order to pick up students.

Reporting Accidents

In the event of an accident to a nonpublic school student while in the MIU or on the premises of a neutral site, notify the nonpublic school principal or his/her designee immediately. In addition, notify your program office for specific instructions and procedures.

In the event of an accident to a Central ESEA Chapter 1 staff member, notify your Chapter 1 office immediately.

MIU Monthly Verification Forms

In completing the monthly verification forms, the following procedures must be adhered to:

Only Chapter 1 personnel should complete the forms.

These forms should be filled out and initialed on a daily basis. The first teacher with an instructional period should sign the MIU in and the last teacher with an instructional period should sign the MIU out.

The information entered must reflect the exact time of arrival and departure. If there is a change in the arrival or departure times, this information is to be reflected an the MIU verification form.

Chapter 1 staff designated to mail the Monthly

Verification Forms on the last school day of each month must follow the procedures outlined below:

Give the first and second copies of the form to the MIU driver.

Send the third and fourth copies of the form to the following address:

Bureau of Nonpublic School
Reimbursable Services
347 Baltic Street Rm. 211
Brooklyn, N. Y. 11201
Attention: MIU

Cancellation of Chapter 1 Classes During the Instructional Day

In the event that Chapter 1 classes are canceled during the course of the instructional day, the MIU is to remain at the site and staff is to complete required Chapter 1 related duties. No MIU may leave early, unless it is approved by the Director's office.

School Closings

If a nonpublic school is closed and it is mutually agreeable to the principal and the Chapter 1 staff, we will arrange to have the MIU at the school in order for staff to complete activities related to the Chapter 1 programs. Only one MIU will be dispatched to each school.

Staff is not to call Nev York Bus Service. All

questions and/or problems relating to the MIUs are handled through the front office.

Safety Procedures

- *In order to ensure the safety of the Chapter 1 staff and students, no unidentified visitors may enter the MIU until clearance is obtained from the Central Board of Education office.*

- *All emergencies should be reported via the communication system to the nonpublic school principal by the Chapter 1 staff or the driver. In addition, the Director's office should be notified.*

- *Doors must be kept closed at all times.*

- *Drivers are to escort pupils in and out of the building, if necessary.*

- *Students are never to be left unsupervised in an MIU.*

- *There is to be no smoking in any section of the MIU.*

- *Duplicating machines are not allowed on the MIU.*

- *The MIU aisles must be kept clear at all times.*

- *Children's clothing should be hung on the hooks provided in the vehicle.*

- *Only the Chapter 1 staff or the driver may regulate the temperature controls.*

- *We strongly suggest that female staff not wear high*

heels in the MIU.

Parking Problems

In the event the MIU cannot park in its designated spot and you are unable to hold classes, you are to notify Carole Kaufman immediately at (718) 935-4164. We will call the local precinct to have the cars ticketed and/or towed. The MIU will park in the nearest legal spot. If it is close enough to walk the children, you may hold your classes; if not, you will do Chapter 1 related work in the MIU. You may not work in the nonpublic school.

Fire Drills

Staff should be aware of the location of the nearest fire alarm box.

Refer to the special memo for procedures for fire and evacuation drills for MIU's.

Duties of the Driver

The Driver Will:

1. *Adhere to the MIU time schedules determined by the Board of Education.*
2. *Arrive on time at the site or sites.*
3. *Call the dispatcher if the MIU will be late.*
4. *Stay at the site in the MIU during the hours scheduled.*
5. *Park at the designated location, unless it is unavailable.*

6. *Escort pupils out of school to the MIU and from the MIU back to the school. If the children must cross a street, the driver must cross with them at an intersection.*
7. *Take a lunch time determined by the teacher. When the MIU is scheduled at two locations in one day, the driver shall be assigned a lunch break at the first location. If more than one MIU is at a site, lunches should be staggered to avoid absence of all drivers at a particular time.*
8. *Take a lunch break of 45 minutes to one hour, as directed.*
9. *Use appropriate language with the children.*
10. *Call the dispatcher if there is a problem not covered by the rules listed above.*

MIU Violation Forms

Attached for your information is a copy of the MIU Notice of Violation form. If a violation occurs, please contact Carole Kaufman at (718) 935-4164 as soon as possible for appropriate follow-up by the Central office.

Aguilar v. Felton

AS PREVIOUSLY STATED, PLEASE BE REMINDED THAT, IN ACCORDANCE WITH THE AGUILAR V. FELTON DECISION, STAFF IS PROHIBITED FROM PROVIDING TEACHING OR COUNSELING SERVICES ON THE PREMISES OF RELIGIOUSLY-AFFILIATED SCHOOLS. [Notice of Violation Form Omitted]

New York City Board of Education
347 Baltic Street
Brooklyn, N.Y. 11201

Bernard Macklowitz
Chancellor

Joseph J. Saccente
Chief Executive for Operations

Bureau of Nonpublic Schools
Reimbursable Services
Margaret O. Weiss
Director
(718)935-4164

Guidelines for Staff Assigned to CAI - #1
1989-1990

For All CAI Teachers

The following timekeeping procedures will be adhered to:

The official work hours at Baltic Street are 8:40 A.M. - 3:00 P.M. Teachers will sign the attendance books in their respective offices, noting the exact time of arrival and the exact time of departure. Additionally, they will record their time on their time sheets.

For teachers who have a split assignment, i.e. CAI and a public school or a neutral site or a MIU please refer to the appropriate guidelines for timekeeping procedures.

Testing Procedures

In order to expedite testing of students in the CAI program, CAI teachers assigned to the same school will work as a team. Whenever possible, CAI teachers from all the programs should coordinate their testing days so that testing might be done expeditiously. The principal must be called

before any testing is planned. The noninstructional technician will accompany the teachers to aid them in noninstructional tasks associated with the testing procedure, where feasible.

Staff will administer their diagnostic testing program in the nonpublic public school and upon completion, the teacher must leave the nonpublic school and return to Baltic Street in order to register the participants.

Student - Teacher Ratio

The student - teacher ratio for CAI only schools is as follows:

FTE	*Range*
.1	*20-35 students*
.2	*36-60 students*
.3	*61-84 students*
.4	*85-105 students*
.5	*106-130 students*
.6	*131-150 students*

Scheduling For Instruction

Based upon past experience, the following should serve as a guide in scheduling for instruction. Schedules should be determined based on the needs of the students and in consultation with the nonpublic school principal. In some cases the principal might request a different configuration.

In CAI only schools, most students will be scheduled for 30 minute periods three times a week (for a total of 90

minutes) if he/she is enrolled in only one subject area. If a student is enrolled in more than one subject area then he/she will be scheduled for a thirty minute period twice a week for each subject. If a child is receiving combination services i.e., MIU and CAI, he/she is then scheduled for CAI Instruction for two periods a week, and interfacing with the teacher once a week. In some cases, students may be registered for only CAI instruction in a combo school. These students should be scheduled for three thirty-minute perioas.

The noninstructional technician works 5 1/2 hours per day exclusive of lunch. When scheduling, please keep in mind that the technician needs 15 minutes at the beginning of each day to bring up the computers, and ten minutes at the end of the day to close down the computers.

CHAPTER 1 STAFF, OTHER THAN THE TECHNICIAN, CANNOT BE IN THE NONPUBLIC SCHOOL WHILE STUDENTS ARE RECEIVING INSTRUCTION VIA CAI.

Technicians

Teachers must maintain close communication with the noninstructional technicians. The following procedures are to be implemented:

- *Contacting technicians between 8:40 a.m. and 9:15 a.m. to ascertain if there are any equipment problems, or changes in school schedules, etc.*

- *Notifying the technicians regarding your assigned CAI schedule at Baltic Street.*

Duties of the CAI Teacher

As you are aware, the CAI program will be expanded to include periodic telephone communication with students who receive CAI only instruction. Teachers will be required to call the students and discuss any problems that appear when computer printouts are analyzed. Once telephone schedules have been established on a school-by-school basis, the Chapter 1 teachers will communicate this information to the technicians.

In addition, Chapter 1 teachers will be responsible for the following procedures:

- *All teachers are to register the students in the appropriate courses.*
- *Each teacher is required to run a printout of student lessons every two weeks for his/her own use.*
- *Principals will get printouts every three or four weeks. The technician will run the reports at the school only at the direction of the teacher.*
- *Teachers should call the non-public principal monthly to discuss the printouts. These calls should be logged and saved for future reference in the school folder.*
- *Each teacher must complete a separate folder for each student. The folder should contain an Individual Student Profile form which will itemize the following information: the pre and*

post test dates and scores for that child, his/her initial placement, and changes in that child's prescription and any relevant information obtained from analysis of the printouts and/or telephone conversations.

- *Additionally, each student must have a separate folder. That folder should contain a student master list, a schedule of the CAI program, and a list of all the teachers assigned to that school. This procedure should be coordinated with Heidi Khalak (room 102) or Gilda Bucca (room 207).*

- *It is expected that each teacher will preview lessons to aid them in initial placement and adjustments in prescriptions. Forms to record reactions to these lessons will be available and should be filled out, placed in a separate book and made available to the other CAI teachers in each program for review. A copy of these previews will also be kept in your Coordinator's office.*

CCC Teachers

- *A speech component is being added to all CCC schools with more than two computers. This should be available in October.*

- *All registration is done by the teachers. All changes are to be made by the teacher.*

- *Worksheets are to be generated at Baltic Street by the teacher and the automatically*

sent to the printer in the nonpublic school. PLEASE DO NOT SEND THE ANSWER SHEETS. The noninstructional technician will be provided with stamped envelopes and will mail the completed worksheets to you. Worksheets are to be generated on an "as needed basis," and teachers are encouraged to utilize them for practice and/or enrichment. These worksheets are not to be considered homework assignments.

- *Printouts should be generated every two weeks by the teacher, so that students' work can be closely monitored. (Gains Report and/or Student's Report)*

- *Printouts to the principal should be generated by the technician under the teacher's supervision, every three or four weeks. Instructional staff should ascertain whether the principal prefers the Student Report or the Class Report.*

- *Workbooks are used for the higher level computer programs. Teachers should periodically collect and mark the workbook pages and mail them back to the students.*

ESC - "Jostens Learning Corporation"

- *Menus were made smaller to expedite the registration process.*

- *Registration must be done by the teacher. Teachers will assign students an ID number*

and place the students at the appropriate level. If a child is registered in two subject areas, each teacher must register the child separately, using a different ID number. If a child was in the CAI program last year, please refer to last year's printouts to determine levels completed. The computer will keep subject area files separately.

- *Each school will be updated weekly by Heidi, so that you will be able to get the latest printout.*

- *Teachers are expected to run printouts for their own use every two weeks (Student Lesson Report). It is recommended that these reports be staggered, i.e. on week 1, print out reports for those students in grades 1-3, and on week 2, print out reports for those students in grades 4-6. This will allow you to evaluate individual progress and make appropriate changes in the child's prescription. Reports can be printed at any time during the day whether or not the lab is in use.*

- *If you wish to diagnose the student results, you can review the report an the screen before printing.*

- *Each printout will contain "minutes to complete" information. Teachers are to keep an ongoing record of the time each student spent on the computer so that they will be able to complete the time on task information at the end of the year. This information must*

be compiled on a monthly basis on the Individual Student Profile form.

- *Principals will receive printouts every three or four weeks. Under the teacher's direction, the technician will print out the report and give it to the principal. It is recommended that principals be given the Student Status Report, and then, if needed, the Student Lesson Report. Teachers should discuss these options with the principal.*

- *When a change it to be made in a child's program, the Program Change Form, available in Room 102, is to be filled out. These changes can only be made when the children are not working on the computers. If you cannot get to the computer, please give the form to Heidi. She will make the change, initial it and return it to you. Those forms are to be kept in the school's folder for future reference.*

- *All changes must be made at Baltic Street. No changes are to be made at the nonpublic school.*

- *Tutorial is now available for each student. This should take approximately 10 minutes and all students should be registered for it.*

WICAT Teachers

- *All computers were replaced and the WICAT System is now running on IBM hardware.*

- *A new program entitled "Make a Test" will be installed later this year. Using this program, teachers can create their own computer assignments. Training for this new program will be provided in the early Fall.*

- *Reading 1 and Math 2 have new placement tests. Teachers may use these tests to aid in student placement.*

- *For Reading 2, Dynamic Placement may be used. Teachers will be trained in this placement.*

- *For students who were in the program last year, it is recommended that you refer to printout reports for placement test assignments.*

- *Teachers assigned to WICAT schools should work as a team in the registration process. Registration forms are available to facilitate this process.*

- *It is important that you monitor the student's work very closely since the lesson will keep repeating if the student is not performing at mastery level.*

- *Teachers will instruct technicians to generate <u>Student Reports</u> on a monthly basis and distribute them to the principals. Teachers should generate reports every two weeks for their own use.*

- *ESL reports can only be generated at the school. Technicians will be supplied with stamped, self-addressed envelopes and instructed to mail them to the ESL office every two weeks.*

PLATO Teachers

- *Students are to be registered and placed in their appropriate courses at Baltic Street.*

- *Since printouts are generated on an individual basis and are time consuming, it is essential that a schedule be established and adhered to.*

NEW YORK CITY PUBLIC SCHOOLS

JOSEPH A. FERNANDEZ

Guidelines For Selection of Chapter 1 Participants And Testing Procedures 1990-1991

1. Selection of Participants - Corrective Reading and Corrective Mathematics Programs

In consultation with the nonpublic school principal, staff is to follow the guidelines listed below when selecting students for participation in the Chapter 1 program.

In order to initiate services for September 1990, Chapter 1

Corrective Reading and Corrective Mathematics teachers must refer to the Chapter 1 Eligibility Survey that is being submitted by September 28, 1990.

As in the past, priority must be given to those students who are in the greatest need of remediation.

Use National Percentiles, or PEP or DRP scores when selecting students.

Students should be selected in each grade, in rank order, for program participation starting with the student with the lowest percentile. Please note that there may be a wide range of percentile scores, from grade to grade, i.e. 4th grade participants' percentile scores may range from the 5th percentile to the 23rd percentile while 7th grade participants' percentile scores may range from the 10th percentile to the 30th percentile.

In grades 3 and 6, children who are eligible based on their DRP or PEP scores should receive priority for placement in the program.

When two students have the same percentile and are being considered for participation in the program, priority should be given to the student who participated in the program during 1989-1990.

2. Selection of Participants - English as a Second Language Program

There has been no change in the selection criteria for participation in the Chapter 1 English as a Second Language program.

3. Testing Procedures - All Chapter 1 Programs

Students who participated in the Chapter 1 program during 1989-1990 and who are being nominated for Chapter 1 services in September 1990 need not be pretested. Their Spring 1990 posttest scores will serve as their pretest scores. Only new Chapter 1 nominees will be pretested in September 1990.

Chapter 1 support staff, i.e, guidance counselors, social workers and psychologists, are expected to assist the Chapter 1 instructional staff in the administration of the tests.

If you have any questions regarding these guidelines, please contact your program coordinator.

New York City
Board of Education

347 Baltic Street
Brooklyn, N.Y. 11201

Division of Curriculum and Instruction
Office of Special Projects
Bureau of Nonpublic School Reimbursable Services

Administrative Procedures for Non-Instructional Technicians (School Aide) Assigned to Chapter 1 Computer Room

October 14, 1988

1. *Reporting Absences*

   Each technician is to notify Mrs. Carole Kaufman, at (718) 935-4164, no later that 8:15 a.m. on the day of absence. In addition, please notify the nonpublic school principal of your absence.

   If you are aware of an absence in advance, please notify Mrs. Kaufman and the nonpublic school principal.

2. *Time Keeping Procedures*

   The official work day is 5 1/2 hours, exclusive of lunch. Time sheets will be used to record attendance for each non-instructional technician. It your school is closed, you are assigned to Baltic Street for the day. You are required to punch in and out on the time clock in room 214.

   The following information is to be completed on each

time sheet for each month.

- *Indicate - Last Name, First Name*
- *Program - Chapter 1 CAI*
- *School Number - 347 Baltic Street - Brooklyn, NY*
- *Dist. 64, Budget Code and Project - Leave Blank*
- *Period Ending - Indicate last day of each month*
- *Home Address - Indicate your home address and zip code*
- *Non-Resident of New York City - No*
- *License & File Number - Omit*
- *Social Security No. - Fill in*
- *Position Title - Non-Instructional Technician (School Aide)*
- *Position Symbol - Omit*
- *Official Work Hours - Indicate your official work hours, i.e., 8:10-2:10; etc.*
- *Social Security Deducted - No*

You will record, on a daily basis, exact time of arrival and your exact time of departure with your signature for each working day. Indicate your lunch time in the appropriate box. Please fill in holidays, Saturdays and Sundays.

At the end of each month, please sign the lower left hand corner (Employee) and mail time sheets to:

Mrs. Margaret O. Weiss, Director
Bureau of Nonpublic School Reimbursable Services
347 Baltic Street - Room 211
Brooklyn, New York 11201

Attention: Mrs. Mary Dalto

3. *Payroll*

Checks will be mailed to your house. If you want us to hold them for you, you must submit a letter stating that we are to hold your check for pick-up. You may not leave your school early to pick up your pay check. The checks will be released at 3:00 p.m. If someone else is going to pick up your check, you must give him/her a letter stating that he/she is picking up the check for you.

4. *General Routines*

Upon arrival at the nonpublic school you are to report to the Computer Room at 347 Baltic Street via computer or voice telephone (718) 522-1256).

- *Take attendance daily.*
- *Maintain an attractive Computer learning center.*
- *Power up and power down the system each day.*
- *Bring-up and take down curriculum when needed.*
- *Back-up student records.*
- *Report any problems to the Computer Room immediately (Example: Problems with students names, numbers, courses, etc.)*
- *Maintain a log of systems problems.*
- *Label all Chapter 1 equipment and fill out inventory cards in duplicate, send one copy to Mrs. Kaufman, 347 Baltic Street and keep the other copy on file at the school.*

5. *General Classroom Procedures:*

- *Each Student should be assigned a permanent seat.*
- *Display directions for each computer systems*

- *Do not use Chalkboard (computers are very sensitive to Chalk dust)*
- *Students are not to be left unsupervised in the Chapter 1 Computer room at any time.*
- *In the event of an emergency, notify the nonpublic school principal or his/her designee immediately. In addition, notify the Director's office for specific instructions and procedures (718-935-4164)*
- *There is to be no eating or drinking in the computer room.*
- *The voice telephone in the room is to be used to contact the main office or the computer hotline. It is not to be used for personal purposes. All telephone calls must be listed on the Record of Telephone Calls sheets with the date, number called and person making the call.*
- *Technicians may show the students how to use the computer. You may not instruct them in anything but the use of the computer. If the school schedule changes you must notify the Director's office immediately for instructions. Technicians do not go on class trips, nor do they report to a school that is closed.*

6. *Fire Drills*

- *You are responsible for the safety of the children.*
- *Ask the nonpublic school principal for the school policy regarding fire drills.*
- *When there is a fire drill, you will follow the principal's instructions.*

7. *Dress Code*

We are requesting that staff dress professionally at all times. Dungarees, sweat shirts or "T" shirts are not deemed to be appropriate dress.

New York City
Board of Education

347 Baltic Street
Brooklyn, N.Y. 11201

TO: Non-Instructional Technicians

From: Margaret O. Weiss, Director

Re: Procedures for Non-Instructional Technicians Assigned to Chapter 1 Computers

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As previously stated, the responsibilities of the non-instructional technicians are related solely to the operation and the maintenance of computer equipment.

Under no circumstances are technicians to instruct children in their lessons. This includes reading and or defining words, and assisting students in mathematical computations.

If a child asks for the definition or spelling of a word, it is permissible to hand him/her a dictionary.

It is extremely important that all technicians follow the procedures outlined above.

If you have any questions concerning these instructions, please contact Carole Kaufman at (718) 935-4164.

MOW:fld
CC: Rose McKenna
Thomas Kelly
Carole Kaufman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- x

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

-against-

SECRETARY, UNITED STATES DEPARTMENT of EDUCATION AND CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

AFFIDAVIT SETTING FORTH THE CHANCELLOR'S FOURTH BI-MONTHLY REPORT WHICH DESCRIBES THE ALTERNATIVE PLAN

- -x

STATE OF NEW YORK)
:SS.:
COUNTY OF KINGS)

JOSEPH J. SACCENTE, being duly sworn, deposes

and says:

1. I am the Chief Executive for Operations of the Board of Education of the City School District of the City of New York (the "Board of Education") and have held this or the equivalent position since 1976. I am responsible for implementing policy decisions made by the Chancellor and the Board of Education, particularly as these decisions apply to the thirty-two community school districts. Accordingly, in mid-April 1986, the Chancellor asked me to implement the Board of Education's alternative September 1986 plan for the delivery of Chapter 1 services to sectarian school children.

2. I began my career with the Board of Education as a teacher in 1957, and have subsequently held the positions of assistant principal, Director of State Funded Programs (Community Education Centers), Chief of Staff to the Chancellor and Assistant Superintendent for Operations to the Chancellor, before assuming my present position. I hold New York State certification and New York City Board of Education licenses for the positions of assistant principal (elementary school), assistant principal (junior high school) and principal (elementary school). I also hold New York State certification as a school district administrator.

3. This affidavit describes the Board of Education's September 1986 plan for the delivery of Chapter 1 services to sectarian school children. The plan is the result of a nearly year-long effort to develop a plan that would be as educationally beneficial and cost effective as possible, within the constraints imposed by the Aguilar decision. At the same time, the plan had to satisfy the requirements imposed by the Chapter 1 statute and regulations -- including the requirement that sectarian school children be offered

services which are equitable in relation to those offered public school children.

4. In accordance with this Court's judgment, the plan provides that as of the start of the September 1986 school year, public school personnel will not provide Chapter 1 teaching and counseling services on the premises of sectarian schools within New York City. For a brief period at the start of every school year, children in the Chapter 1 program receive diagnostic testing; we may hold this diagnostic testing in the sectarian schools next fall. Counsel has advised me that in Wolman v. Walter, 433 U.S. 229, 238-244 (1977), the Supreme Court held that it is constitutionally permissible to hold diagnostic testing in sectarian schools.

Summary of the September 1986 Plan

5. For September 1986, the Board of Education has offered Chapter 1 services to sectarian school children at two types of sites: public schools and mobile instructional units ("MIUs"). For the 1986-87 school year, 242 sectarian schools in New York City have been offered Chapter 1 services through the Board of Education's Office of Special Projects. The students in 194 schools (80% of the sectarian schools), have been offered Chapter 1 services in the public schools. The students in 48 schools (20% of the sectarian schools), have been offered Chapter 1 services in MIUs.

6. As the Second Circuit recognized in this case, the alternative methods of delivering Chapter 1 services off the premises of sectarian schools "are almost certain to be less effective, more costly, or both." Felton v. Secretary, United States Department of Education, 739 F.2d 48, 71 (2d. Cir. 1984). Our experience in developing the

September 1986 plan has demonstrated the accuracy of this prediction. Both types of sites which are part of the plan have disadvantages -- either in terms of educational effectiveness or cost -- which make them less desirable than the current on-site provision of services. We anticipate that both the plaintiffs and some of the defendant-intervenors may express dissatisfaction with the plan, albeit for different reasons. However, it is the Board of Education's position that the September 1986 plan is a reasonable solution to a problem for which no ideal solution is now available, and that the September 1986 plan offers equitable services to sectarian school children in a manner consistent with this Court's judgment.

7. The Board of Education will also provide Chapter 1 services during the 1986-87 school year to two non-sectarian private schools, the Melrose Community School and the St. Thomas Community School. Both schools are independent private schools with no religious affiliation. The St. Thomas Community School is operated by a Parent Executive Board composed of parents of students in the school. The Melrose Community School is operated by a School Board composed of parents and community leaders. In the 1986-87 school year, Chapter 1 services will be provided on the premises of these two non-sectarian schools.

8. The remainder of this report describes the September 1986 plan in further detail and explains why it was chosen. The plan is actually 242 plans -- one for each sectarian school in the Chapter 1 program. (The specific plans for the 242 sectarian schools are presented in Exhibits "A" and "B' annexed to this affidavit.)

9. This report is organized, as were our previous

reports to the Court, by separate discussions of the three alternative types of sites for the provision of Chapter 1 services which have been under consideration since last summer -- public schools, MIUs and neutral sites. After reviewing the three types of sites and the factors which determined the extent of their inclusion in our September 1986 plan, this affidavit describes the recent consultation process with sectarian school officials, principals and parents concerning the plan. Finally, this affidavit describes additional alternatives for the provision of Chapter 1 services that will not be available for September 1986, but which may be implemented later in the 1986-87 school year. These include neutral sites, a small number of semi-permanent trailers and an experimental pilot program for the provision of Chapter 1 services in the sectarian schools by an independent, private contractor.

The Three Alternative Types of Chapter 1 Sites

A. Public Schools

10. Under the plan, school children in 80% of the sectarian schools have been offered Chapter 1 services at a public school as of September 1986. Public school sites were selected for the majority of children because this is the only type of site, of the three under consideration, which is now available and can serve a large percentage of the approximately 21,000 sectarian school children in the program at a reasonable cost.

11. The United States Department of Education has ruled that the administrative costs incurred in providing alternative sites for Chapter 1 services for sectarian school children (for transportation, leasing of neutral space or MIUS, etc.) must be charged against the total allocation of Chapter 1 funds received by New York City.

12. These "off the top" charges reduce the amount of funds available for instruction and counseling services for both public and non-public school children, with the result that fewer children in both groups can be served. Accordingly, in creating a plan which provides equitable services to sectarian school children and meets other applicable legal requirements, a high priority was given to keeping these administrative costs as low as possible.

13. Although the use of public schools is clearly the most cost effective of the three alternatives, that could not be our sole consideration. Every offer of Chapter 1 services to sectarian school children must also meet the equitable services mandate set forth in the Chapter 1 statute

and regulations. The statute requires the Board of Education "to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools." 20 U.S.C. § 3806(b)

14. The Chapter 1 regulations further define this requirement. The regulations state that, "The Chapter 1 services that an LEA [local educational agency] provides for educationally deprived children in private schools must be equitable (in relation to the services provided to public school children). . . ." 34 C.F.R. § 200.71(b), and that, "The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools." 34 C.F.R. § 76.654(a).

15. Accordingly, our Chapter 1 plan for sectarian school children must offer services which are equitable to those provided to New York City public school children. Approximately 175,000 public school children are enrolled in the Board of Education's Chapter 1 program. They all receive Chapter 1 services in the public schools during the regular school day.

16. To satisfy the equitable services requirement, we have offered the sectarian school children Chapter 1 services during the regular public school day, rather than after school.

17. We rejected an after school program based on the Board of Education's own unsuccessful experience in operating an after school Chapter 1 program for non-public school children, which was similar to the experiences of other school districts. As previously described in the

original record in this case and the Chancellor's Initial Report Concerning an Alternative Plan (¶¶ 37, 51-52), our experience showed that an after school Chapter 1 program is not as effective as a program operated during the regular public school day.

18. The Board of Education's after school Chapter 1 program for non-public school children was neither as educationally effective nor as well attended as the regular school day program, and was abandoned after one year. Among the reasons for the program's failure were that teachers and students were tired, parents were concerned about younger children coming home in the dark in winter and older children had jobs and other after school activities.

19. Our unsuccessful experience with an after school Chapter 1 program is consistent with that of many other school districts. For instance, in Wamble v. Bell, 598 F. Supp. 1356, 1361 (W.D. Mo. 1984), an after school Chapter 1 program in Missouri was found to have failed because of "student and teacher fatigue, conflicts with after school activities, late home arrival, parental concern for safety, students' conception that the after hours program was punishment, and conflicts with family obligations."

20. The major problem we faced, in mounting a large Chapter 1 program for sectarian school children in the public schools during the regular school day, was the shortage of space in some of our public schools. Due to severe overcrowding in the public schools in several community school districts, we were unable to find space in proximate public schools for 20% of the Chapter 1 sectarian schools.

21. Since Chapter 1 services will be offered

during the regular school day, the time students spend traveling between their sectarian school and the public school had to be considered, since this will usually be time lost from their regular instruction.

22. As previously described in the Chancellor's Third Report to the Court (¶¶ 6, 7), in March 1986 we calculated the travel time, door to door, between each sectarian school and the public school or schools with which it had been matched. We based the walking time on an estimated average time of four minutes per block. We measured the driving time by actually driving from one school to the other. Subsequently, we made new matchings for some sectarian schools, to public schools with shorter travel times.

23. To minimize the travel time as much as possible, we established a maximum one way travel time of approximately ten minutes after reviewing this data. We selected this maximum time because it allows us to avoid imposing, on any child, a large loss of instructional time due to travel, while at the same time accommodating most sectarian school children in public school sites.

24. We have offered roundtrip transportation to every child assigned to a public school site during the regular public school day, except where the matched schools are next door or directly across the street from each other. This will increase the number of students who can be served at public school sites, further reduce the travel time of some students who are within ten minutes' walking distance of the assigned public school, and provide supervision for the children while they are traveling between schools.

25. The sectarian school students will be

transported by mini-vans or by standard size school buses. A matron is assigned to each vehicle to supervise the children. These vehicles, which are already under contract to the Board of Education, are now used to transport students between their homes and school at the beginning and end of the school day. The vehicles and matrons will therefore be available, for Chapter 1 purposes, between the hours of 9:00 a.m. and 2:30 p.m.

26. Based on the described considerations, for September 1986, we have been able to offer Chapter 1 services in public school classrooms to students in 194 (or 80%) of the sectarian schools in the Chapter 1 program. (A list of the 194, sectarian schools with the matched public schools is annexed as Exhibit "A".)

27. In some cases, based on preferences expressed by sectarian school officials, principals and parents, we may be able to offer a second public school as an alternative to the matched school Listed in Exhibit "A". For instance, we are investigating the use of Public School 157, which is in District 14 in Brooklyn and has many vacant classrooms, for many of the Hebrew day school children in District 14. Some affected Hebrew day school principals and officials have expressed a preference for this optional offer.

28. In other cases, sectarian school officials and principals have expressed a preference for an after school program in the public schools. We will offer these officials and principals an after school program in a public school as an alternative to the regular school day program.

b. Mobile Instructional Units ("MIUs")

29. As discussed above, we were unable to find public school space for students in 48 (or 20%) of the sectarian schools. We have ordered MIUs to serve the children in these 48 schools. (A list of the schools is annexed as Exhibit "B.")

30. Based on the number of students in these schools who receive Chapter 1 services, and the types of services provided, we determined that 70 MIUs would be required. The MIUs will be parked on the public streets in proximity to the sectarian schools during the school day.

31. The MIUs have been leased for 6 hours and 20 minutes a day (which is the length of the regular public school day), and we want to maximize their use. Teachers are scheduled to teach five periods a day, pursuant to their collective bargaining agreement, and there are eight teaching periods in the regular school day. Accordingly, after the first teacher has completed five teaching periods, it may be possible to assign the MIUs to an additional sectarian school for a small portion of the school day, at no additional cost.

32. As described in the Chancellor's prior reports to the Court, competitive bid proposals were solicited from private contractors for the leasing of MIUS. We received seven bids by April 14, 1986, the bid opening date.

33. Of these, only two bidders complied with the specifications we had designed. The lowest bidder could only provide 20 MIUS. The second lowest bidder could provide 70 MIUS, but we only needed 50 more. Accordingly, a contract for 20 MIUs has been awarded to the Daily Bus and Truck Rental Group, and a contract for 50 MIUs has been awarded to Ferdinand Arrigoni, Inc. Both

contracts specify that the delivery date is the opening day of school in September 1986.

34. Each contract requires the supplier to custom build the MIUs to our specifications. Each supplier must also provide all necessary cleaning, maintenance, repair, security, insurance and garage services.

35. In addition, the supplier will provide drivers, who will drive the MIUs to the sectarian schools, remain in the MIUs to provide security, and return the MIUs to the garage at the end of the day. Finally, each contract requires the supplier to build and maintain spare MIUs, to be used as replacement vehicles when necessary. Pursuant to a contractual formula, the Arrigoni contract requires 5 spare MIUs and the Daily Bus contract requires 3 spare MIUs.

36. The cost of the MIUs is contractually established an a per diem basis. For a 6 hour and 20 minute day the cost of each MIU supplied by Daily Bus will be five hundred seventy-five dollars ($575) and the cost of each MIU supplied by Arrigoni will be five hundred ninety-four dollars ($594).

37. The annual cost of each MIU will depend on the number of days the MIU is operated during the school year, which is not known at this time. We anticipate an annual cost of approximately seven million dollars ($7,000,000) for the leasing and all related services for 70 MIUs.

38. Although this is a large expenditure, we believe it is reasonable in the circumstances, in which we are seeking to maintain a New York City Chapter 1 program, for both public and non-public school children, which meets

all legal requirements.

39. This expenditure must be viewed in relation to the total Chapter 1 allocation and program. The MIU expenditure constitutes approximately 3.5% of the total Chapter 1 allocation for New York City, which exceeded 212 million dollars in the 1985-86 school year, and which served approximately 196,000 school children during this year. We leased these MIUs to offer equitable services to all sectarian school children in the Chapter 1 program. A failure to make an equitable offer to all the sectarian school children would jeopardize the entire New York City Chapter 1 program. (See the affidavit of Robert D. Stone, Counsel and Deputy Commissioner for Legal Affairs in the New York State Education Department, sworn to on July 30, 1985, annexed to the Chancellor's Initial Report, ¶¶ 5, 17, and Exhibits "A", "B" and "D" annexed to the Chancellor's Initial Report.)

40. Finally, the New York State Legislature has passed, and the Governor has signed, an appropriation for funds to local school districts, state-wide, for administrative costs of the Chapter 1 program. An additional authorizing statute must still be enacted before the funds are made available. If the statute is enacted, we anticipate that New York City would receive an allocation that would cover a substantial portion of the cost of the MIUs for the 1986-87 school year. We would certainly welcome these additional funds, but even if they are not allocated, it is appropriate to order these MIUs based on the considerations which determined the September 1986 plan.

C. Neutral Sites

41. The plan for September 1986 does not include

any neutral sites, because we do not anticipate that any neutral sites will be ready for Chapter 1 use by September 1986.

42. As documented in our prior reports to the Court, to date we have found only three appropriate neutral sites: the Bridgefield Civic Center; the Compos Community Center and the Kips Bay Boys Club. These are the only sites we have inspected which satisfied all of the following conditions: the owner is interested in leasing to us; the site is located near a sectarian Chapter 1 school; the space is appropriate for instructional use and the space requires only modest renovations.

43. Lease negotiations have not yet been concluded for any of the three identified neutral sites. It normally takes many months after negotiations are concluded for the lease approval process and the renovations to be completed. Accordingly, none of these three sites will be ready in September 1986, although they may be ready for Chapter 1 use sometime later in the 1986-87 school year.

The Consultation Process with Sectarian School Officials, Principals and Parents

44. As described in the Chancellor's prior reports to the Court, over the course of the past year, we have met regularly with sectarian school officials and have also sought information from sectarian school principals and comments from sectarian school parents, concerning the development and implementation of the September 1986 plan. Since the Chancellor's Third Report to the Court, we have continued this consultation process.

45. Over a two week period, commencing on May 5, 1986, each of the principals of the 242 sectarian schools in next year's Chapter 1 program met individually with a member of the Chancellor's staff.

46. In these meetings, we discussed with each principal our proposed Chapter 1 plans for September 1986 for his or her school. Each principal was asked to comment on our proposed plan for his or her school, and the principal's comments were recorded on a form which was then reviewed by the Chancellor's staff. A blank sample of this form, which was developed after consultation with the New York State Education Department, is annexed as Exhibit "C".

47. Almost all principals stated that they did not want their children to attend a Chapter 1 program in a public school. Many principals stated that they would strongly prefer that their children attend a Chapter 1 program in an MIU, rather than in a public school. Many other principals stated that they would rather their children attend a Chapter 1 program in a neutral site, rather than in a public school,

and some of these principals suggested potential neutral sites that are near their schools. As we have informed the principals in writing, we are investigating those proposed sites where the use of neutral space would be reasonable and the proposed site appears to be appropriate for instruction and truly neutral. However, we do not anticipate that any of these proposed neutral sites will be available by September 1986. The individual letters to every sectarian school principal are annexed as Exhibit "D".

48. On May 22, 1986, I addressed a meeting of the non-public school Parents' Advisory Council. This group represents parents of non-public school children enrolled in the Chapter 1 program. The questions and comments of the parents who attended this meeting indicated that they were concerned about, and in almost all cases opposed to, sending their children to the public schools for Chapter 1 services. Many parents questioned why we could not continue the program as before, using public school teachers in the sectarian schools. I explained that the Supreme Court had ruled that our present program is unconstitutional.

49. Since April 1986, when the Chancellor asked me to implement the alternative September 1986 plan, I have also attended numerous meetings with sectarian school officials to discuss the possible alternatives for the September 1986 plan, to develop the format for and coordinate the individual interviews which were held with the sectarian school principals in May and to discuss additional types of sites for Chapter 1 services which might be used in the future.

Possible Future Alternatives for the Provision of Chapter 1 Services to Sectarian School Children

50. We are also investigating other alternatives for the future provision of Chapter 1 services. We do not anticipate that we will be able to implement any of these alternatives by September 1986, but we anticipate implementing one or more of these alternatives during the course of the 1986-87 school year.

51. First, as described above, we will continue to seek additional neutral space, and will consider proposed neutral sites suggested by the sectarian school principals, in cases where the use of neutral space is reasonable. We are also trying to find apartments, houses and public libraries which could be made suitable for Chapter 1 purposes. Our experience in seeking neutral sites this year has shown that it is very difficult to lease neutral space. Many potential sites would have required extensive renovations to be made code compliant for classroom occupancy, and many owners were simply not interested in leasing their space to the Board of Education.

52. We have also developed a preliminary design and specifications for semi-permanent trailers, which may be cheaper than the MIUs. These trailers would be stationary during the school year, but could be moved during summer vacations. Once the design and specifications are approved as compliant with all applicable codes, statutes and regulations, we will seek bids for a small number of these trailers.

53. If an acceptable bid is received, we plan to place some of these trailers on property leased by the Board

of Education from sectarian schools. The leased property would be near the sectarian school building (most likely in the sectarian school playground or parking lot) and the trailers and the underlying property would be suitably separated from the sectarian school property and would be marked as public property. The New York State Department of Education has taken the position that this arrangement is acceptable, in appropriate cases.

54. We would also place some of these semi-permanent trailers on the curbside near the sectarian schools. This would allow us to determine the feasibility, from a practical standpoint, of using these trailers for Chapter 1 purposes at the same type of location that the MIUs will be placed at (without moving the trailers at night as the MIUs will be moved).

55. We are also investigating the possibility of entering into contracts with independent, private organizations to provide Chapter 1 services and supervision. The services would be provided by a private contractor in the sectarian school. Supervision of the teachers, paraprofessionals, guidance counselors and therapists would also be provided by a private contractor.

56. Our initial plan for the use of an independent contractor would be a small pilot program involving at most a few schools. The United States Department of Education has informed us that the Department has no objection to our establishing this pilot program on a test case basis.

57. The Chancellor will notify both the Court and plaintiffs' counsel concerning our plans regarding: a) the siting of semi-permanent trailers on property leased from the sectarian schools or b) the use of an independent contractor,

as soon as a final decision has been made to implement either of these alternatives.

Conclusion

58. In accordance with the judgment of this Court, filed on September 26, 1985, as affirmed by the United States Court of Appeals for the Second Circuit in an order filed on March 26, 1986, I submit this affidavit as the Board of Education's plan for the Provision of Chapter 1 services as of September 1986.

[Joseph J. Saccente]
Joseph J. Saccente

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Sworn to before
me this 3rd day
of June, 1986

[Catherine Spatafora]
Notary Public

Catherine Spatafora
Notary Public, State of New York
Qualified in Queens County
Commission Expires, May 31, 1988

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #1

Non-Public School	Rooms Needed	# of Day/Week	Matching Public School
Immaculate Conception 419 East 13th Street	1	2	P.S. 61 620 E 12th St.
Mary Help of Christians 435 E. 11th Street	1	3	P.S. 19 185 First Ave.
Our Lady of Sorrows 219 Stanton Street	1	5	P.S. 63 121 E. 3rd St.
St. Brigid 185 E. 7th Street	3	5	P.S. 64 600 E. 6th St.
St. Stanislaus 104 St. Mark's Pl.	1 1	5 2	P.S. 63* 121 E. 3rd St.
Beth Jacobs 142 Broome Street	1	4	P.S. 20 166 Essex St.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS
June 2, 1986

DISTRICT #2 (1 of 2)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Cross 332 W. 43 St.	2	5	P.S. 51 520 W. 45th St.
Our Lady of Good Coun. 33323 E. 91 St.	1 1	5 3	P.S. 151 1763 First Ave.
Sacred Heart of Jesus 456 W. 52 St.	1 1	5 3	P.S. 111 440 W. 53rd St.
St. Catherine of Siena 420 E. 69 Street	1 1	5 3	P.S. 183 419 E. 66th St.
St. Columba 331 W. 25th St.	1 1	5 3	P.S. 11* 320 W. 21 St.
St. Francis De Sales	1 1	5 4	P.S. 198 1700 Third Ave.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. James 37 St. James Pl.	1	1	P.S. 1* 8 Henry St.
St. Joseph 420 E. 87th St.	1 1	5 1	P.S. 190 331 E. 82th St.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #2 (2 of 2)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Joseph 1 Monroe Street	1 1	5 3	P.S. 126 80 Catherine St.
St. Joseph 111 Washington Pl.	1	3	P.S. 3 490 Hudson St.
St. Patrick 233 Mott Street	4	5	P.S. 42 71 Hestor St.
Transfiguration 29 Mott Street	1 1	5 1	P.S. 1* 8 Henry Street
St. Francis Xavier 126 W. 17th St.	1	2	P.S. 11* 320 W. 21 St.*

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS
June 2, 1986

District #3

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Blessed Sacrament 147 W. 70th Street	1 1	5 3	P.S. 199 270 W. 70th St.
Holy Name of Jesus 202 W. 97 Street	3	5	JHS 118* 154 W. 93 St.
St. Gregory the Great 138 W. 90 St.	1 1	5 1	JHS 118* 154 W. 93 St.
Yeshiva Chofetz Chaim 346 W. 89th St.	1	4 (per session)	P.S. 166 132 W. 89th St

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #4

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Mt. Carmel-Holy Rosary 371 Pleasant Ave.	1 1	5 3	P.S. 7* 150 E. 20th St.
Our Lady Queen of Angels 232 E. 113th Street	1 1	5 1	P.S. 102 315 E. 113th St.
St. Cecilia 220 E. 106 Street	3	5	J.H.S. 117* 240 E. 109th St.
St. Lucy 340 E. 104 Street	1	3	P.S. 121 232 E. 103rd St.
St. Ann 314 E. 110 Street	1 1	5 1	JHS 117 240 E. 109th St.

St. Paul 114 E. 118 Street	1 1	5 2	P.S. 7* 160 E. 120th St.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #5

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Annunciation 461 W. 131 Street	1	4	P.S. 129 425 W. 130th St.
Resurrection 282 W. 151 Street	1	3	P.S. 46* 2987 Eight Ave.
St. Aloysius 223 W. 132 Street	1	4	P.S. 154* 250 W. 127th St.
St. Joseph 168 Morningside Ave.	1	3	P.S. 125* 425 W. 123rd St.
St. Mark the Evangelist 55 West 138 Street	1	5	P.S. 123* 1301 W. 140th St.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Corpus Christi 535 W. 121 Street	1	5	P.S. 125* 425 W. 123rd St.
Our Lady of Lourdes 468 W. 143 Street (District 6)	3	5	P.S. 123* 301 W. 140th St.
St. Catherine of Genoa 508 W. 153 Street	1	5	P.S. 46* 2987 Eight Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #7

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Immaculate Conception 378 E. 151 Street	2	5	P.S. 1 335 E. 152nd St.
SS. Peter & Paul 838 Brooke Ave.	1 1	5 3	P.S. 157* 757 Cauldwell Av.
St. Adalbert 419 E. 155 St.	1	2	P.S. 29 758 Courtland Av.
St. Anselm 685 Trinity Ave.	2 1	5 3	P.S. 161 628 Tinton Ave.
St. Jerome 222 Alexander Ave.	2	5	P.S. 154 333 E. 135th St.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St.Luke 608 E. 139 St.	3	5	P.S. 65 141 St. & Cypress Ave.
St. Pius V 413 E. 144 Street	2 1	5 2	JHS 149 360 E. 145th St.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #8

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Cross 1846 Randall Ave.	2 1	5 3	P.S. 69 560 Theriot Ave.
Holy Family 2169 Blackrock Ave.	1 1	5 3	JHS 125 111 Pugley Ave.
St. Frances de Chantal 2962 Harding Ave.	1 1	5 1	P.S. 72 Dewey & Edison Ave.
St. John Vianney 2141 Seward Ave.	1	5	I.S. 174 456 White Plains Rd.
Greek American Institute 3573 Bruckner Blvd.	1	5	P.S. 71 3040 Roberts Av.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Blessed Sacrament 1160 Beach Ave. (Dist. 12)	1	3	P.S. 100 800 Taylor Av.
St. Athanasius 830 Southern Blvd.	3 1	5 3	P.S. 60 888 Stebbins Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #9

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Christ the King 1345 Grand Concourse	2	5	JHS 117* 1865 Morris Av.
Sacred Heart Middle 1248 Nelson Ave.	2	5	I.S. 82 1700 Macombs Rd.
Sacred Heart Prima 95 W. 168 Street	2 1	5 1	P.S. 126 175 W. 166th St.
St. Angela Merici 226 E. 163	3	5	I.S. 145 1000 Teller Ave.
St. Augustine 1176 Franklin Av.	1	3	P.S. 63 1260 Franklin Av.
St. Joseph 1946 Bathgate Av.	1	2	P.S. 58 E. 176th St. & Washington Ave.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Margaret Mary 121 E. 177 Street	1	4	JHS 117* 1865 Morris Av.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #11

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Rosary 1500 Arnow Ave.	1	4	I.S. 144 2545 Gunther Av.
Immaculate Conception 760 E. Gunhill Road	1 1	5 3	P.S. 89 980 Mace Ave.
Our Lady of Grace 3981 Bronxwood	1	3	P.S. 21 715 E. 225th St.
St. Helena 2050 Benedict Ave.	1	4	JHS 127 1560 Purdy St.
St. Lucy 830 Mace Ave.	1	2	JHS 135 2441 Wallace Ave.
St. Brendan 268 E. 207 St. (Dist. 10)	1 1	5 2	JHS 113 3710 Barnes Ave.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #12

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Anthony 1776 Mansion Street	1	3	I.S. 167 1970 W. Farm Rd.
St. John Chrysostom 1144 Hoe Ave.	2	5	P.S. 150 920 E. 117th St.
St. Thomas Aquinas 1909 Daly Ave.	2	5	P.S. 6 100 E. Tremont Ave.
R.T. Hudson SDA 1122 Forest Ave.	1	2	I.S. 158 800 Home St.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #13

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Ft. Green Cath. Vand. Ave. Lafayette & Vand.	1	2	I.S. 113* 300 Adelphi St.
Hanson Place SDA 38 Lafayette Ave.	1	3	I.S. 113* 300 Adelphi St.
Mt. Pisgah Christian 760 Dekalb Ave.	1	2	P.S. 54 195 Sanford St.
Unity Catholic 991 St. John Place (Dist. 17)	1	5	P.S. 56 170 Gates Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #14 (1 of 3)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
All Saints Elementary 58 Whipple Street	1	2	P.S. 297 700 Park Ave.
Most Holy Trinity 140 Montrose Ave.	1 1	5 4	P.S. 250 108 Montrose Ave.
Our Saviour 250 Hooper Street	2 1	5 2	P.S. 16 157 Wilson Street
SS. Peter & Paul 288 Berry Street	3	5	P.S. 84 250 Berry St.
St. Stanislaus Kosta 10 Newell Street	1	2	J.H.S. 126* 424 Leonard St

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Vincent de Paul 180 N. 7th Street	1 1	5 2	P.S. 17* 208 N. 5th St.
Bais Yaakov K'Kahl Adas Y. 563 Bedford Ave.	1 1	1 3 P.S.	P.S. 157* 850 Kent Ave.
St. Anthony - St. Alphonsus 725 Leonard Street	3	5	P.S. 31 75 Meserole Ave.
St. Cecilia 1-15 Monitor Street	3 1	5 3	P.S. 110 124 Monitor St.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #14 (2 of 3)

Non-Public Schools	Rooms Needed	# of Days/ Week	Matching Public School
St. Frances of Paola 1201 Conselyea Street	1	5	J.H.S. 126* 424 Leonard St.
St. Nicholas Elementary 287 Powers Street	1	5	P.S. 147 325 Bushwick Ave.
Bnos Yaakov Yeshiva 62 Harrison Ave.	1 1	2 2 P.S.	P.S. 380 370 Marcy Ave.
Bnos Yerushalayim 12 Franklin Avenue	1 1	1 2 P.S.	P.S. 157 850 Kent Ave.
Yeshiva Ahavas Israel 6 Lee Avenue	2	4 P.S.	P.S. 157* 850 Kent Ave.

Non-Public Schools	Rooms Needed	# of Days/ Week	Matching Public School
Y. Jesode Hatorah V'etz C. 505 Bedford Avenue	2 1	4 P.S. 2 P.S.	P.S. 157* 850 Kent Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #14 (3 of 3)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Y. Kehilath Yakov for Boys 206 Wilson Street	2	4	P.S. 157* 850 Kent Ave.
Yeshiva Mes. Arugath Habosem 171-173 Hooper Street	1	4 P.S.	P.S. 157* 850 Kent Ave.
Brooklyn Temple Elem. 8 Lewis Avenue	1	3	P.S. 59 211 Throop Ave.
Beth Rachel Girls, UTA 227 Marcy Avenue	1	2	P.S. 17* 208 N. 5th St.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #15 (1 of 2)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Name of Jesus 241 Prospect Park West	2 1	5 1	J.H.S. 88* 544 7th Ave.
Immaculate Heart of Mary 3002 Ft. Hamilton Pkwy.	2 1	5 2	J.H.S. 88* 544 7th Ave.
Our Lady of Peace 512 Carroll Street	2 1	5 3	P.S. 32* 317 Hoyt St.
Sacred Heart/St. Stephen 135 Summit Street	2 1	5 1	P.S. 29* 425 Henry St.
St. Agnes 421 Degraw Street	2 1	5 3	P.S. 32* 317 Hoyt St.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Augustine - St. Francis Xavier 763 President Street	5	5	P.S. 321 180 7th Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #15 (2 of 2)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Saviour Elementary 701 8th Avenue	1	3	P.S. 107 1301 8th Ave.
St. Thomas Aquinas - Holy Family 211 8th Street	3 1	5 2	J.H.S. 51 350 Fifth Ave.
Tomer Dvorah 4500 9th Avenue	1 1	2 2 P.S.	P.S. 131 4305 Ft. Hamilton Pkwy
St. Charles Borromeo 23 Sidney Place	1	3	P.S. 29* 425 Henry St.
St. John the Evang. - Holy Family 259 21st Street	2	5	P.S. 10 511 7th Ave.
St. Mary Star of the Sea 467 Court Street	1	4	J.H.S. 142 610 Henry St.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Argyrios Fantis Parochial 195 State Street	1	5	P.S. 29* 425 Henry St.
St. Catherine of Alexandria 1053 41st Street	2	5	J.H.S. 136 4004 Fourth Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #16

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Martin de Porres East 180 Bainbridge Street	1	2	P.S. 21 180 Chauncy St.
New Bedford Stuyvesant JHS 82 Lewis Avenue	4	5	J.H.S. 57 125 Stuyvesant Ave.
Our Lady of Bedford Stuyvesant East 80 Lewis Avenue	1 1	5 2	P.S. 304 280 Hart St.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT # 18

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Family Flatlands Ave. & E. 98th Street	1	1	J.H.S. 211 Ave. J & E. 100th St.
St. Therese of Lisieux 4410 Avenue D	1	1	J.H.S. 285 5095 Beverly Rd.
Excelsior Elementary 418 E. 45th Street	1	2	J.H.S. 232 905 Winthrop St.
Flatbush Seventh Day 5810 Snyder Avenue	1	2	J.H.S. 252 Lenox Rd. & E. 94th St.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #19

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public Schools
Blessed Sacrament 187 Euclid Ave.	2 1	5 3	P.S. 345 111 Berriman St.
St. Fortunata 2635 Linden Blvd.	1	5	P.S. 202* 982 Hegeman Ave.
St. John Cantius Blake Ave. & Vermont St.	1 1	5 2	P.S. 328 330 Alabama Av.
St. John Neuman 237 Jerome Street	3 1	5 2	P.S. 149 700 Sutter Av.
St. Rita 260 Shepherd Ave.	3	5	P.S. 202* 982 Hageman
St. Sylvester 396 Grant Ave.	1	4	P.S. 202 982 Hegeman Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #20 (1 of 3)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Spirit 1668 - 46 Street	1	3	P.S. 192* 4715 18th Ave.
Bais Rochel (Boro Park) 5301 14th Ave.	1 1	2 P.S. 4	P.S. 180* 16th Ave. & 57th St.
Bais Yaakov of Brooklyn 1362 - 49 Street	1	2	P.S. 164* 14th Ave. & 42nd St.
Beth Jacob of Boro Park 1371 - 46 Street	1 1	5 3 P.S.	P.S. 164* 14th Ave. & 42nd St.
Bnos Zion of Bobov 5000 - 14th Ave.	1	3	P.S. 164* 14th Ave. & 42nd St.
Bobover Yesh. Bnai Zion 1533 - 48 Street	2	4 P.S.	I.S. 223* 4200 16th Ave.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #20 (2 of 3)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Y. Beth Hillel of Krasna 1364 - 42 Street	2 1	4 P.S. 2 P.S.	P.S. 164* 14th Av. and 42nd St.
Yesh. Chatzar Hakodesh 1353 50th Street	1	2 P.S.	P.S. 180* 16th Av. & 57th St.
Yesh. Machzikei Hadas Belz 4107 - 16th Av.	2 1	4 P.S. 1 P.S.	I.S. 223* 4200 16th Av.
Yesh. Ohel Moshe 7914 Bay Parkway	1 1	1 4 P.S.	P.S. 186 7601 19th Av.
Yesh. Rabbi Solomon Kluger 1876 - 50 Street	1 1	4 P.S. 3 P.S.	P.S. 192* 4715 18th Av.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Yes. Tiferes Elimelech 58-01 - 16th Av.	1 1	4 2	P.S. 180* 16th Av. & 57th St.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #20 (3 of 3)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Y. Toras Emes Kamenitz 1650 - 56th St.	1 1	3 2 P.S.	P.S. 180* 16th Av. & 57th St.
Yesh. & Yagdil Torah	2	4 P.S.	P.S. 164* 14th Av. & 42nd St.
Y. Yesode Hatorah of Boro P. 1350 50th Street	2	4 P.S.	P.S. 192* 4715 18th Ave.

Yesh. & Mes. Torah Temimah 555 Ocean Parkway (D 22)	2	4 P.S.	JHS 223* 4200 16th Av.
Yesh. Torah Vodaath Elem 452 E. 9th St. (Dist. 22)	2	4 P.S.	P.S. 179 202 Ave. C
Our Lady of Perpetual Help 5902 6th Ave.	2 1	5 2	P.S. 180 16th Ave. & 57th St.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT # 21 (1 of 2)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Most Precious Blood 133-157 - 27th Av.	1 1	5 3	P.S. 212 87 Bay 49th St.
Our Lady of Grace 385 Av. W	1	5	P.S. 216* 350 Av. X

Our Lady of Solace 2865 W. 19 Street	1 1	5 2	P.S. 90 2840 W. 12th St.
SS. Simon & Jude 294 Av. T.	1 1	5 2	JHS 228 Av. S & W 4th St.
St. Mary Mother of Jesus	1	2	P.S. 128 2075 84th St.
Be'er Hagolah Institute 293 Neptune Av.	2 1	5 2	JHS 303 501 West Av.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #21 (2 of 2)

Non Public School	Rooms Needed	# of Days/ Week	Matching Public School
Lubavitcher Chabad 841 Ocean Parkway	2 1	4 P.S. 3 P.S.	P.S. 121* 20th Ave. & 53rd St.

Non Public School	Rooms Needed	# of Days/ Week	Matching Public School
Mirrer Yeshiva K'Tanah Elementary 1791 Ocean Parkway	1 1 1	1 4 P.S. 3 P.S.	P.S. 215 Ave. S. & E. 2nd St.
Shulamith for Girls 1277 East 14th Street	1 1	4 3 P.S.	P.S. 99* 1120 E. 10th St.
Yeshiva Ahi Ezer 2433 Ocean Parkway	1 1	2 1 P.S.	P.S. 216* 350 Ave. X
Yeshiva of Flatbush 919 East 10th Street	1 1	4 3 P.S.	P.S. 99* 1120 E. 10th St.
Yeshiva Karlin Stolin 1818 54th Street	2	4 P.S.	P.S. 121* 20th Ave. & 53rd St.
Yeshiva Rabbi Chaim Berlin 1302 Avenue I	2	4 P.S.	P.S. 99* 1120 E. 10th St.

Non Public School	Rooms Needed	# of Days/ Week	Matching Public School
Yeshiva Sharei Zedek of Sea Gate 3801 Nautilus Avenue	1	1	P.S. 329 2929 W. 30th St.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #23

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Our Lady of Loretto 2365 Pacific Street	1 1	5 3	P.S. 332 51 Christopher Ave.
Risen Christ Lutheran 250 Blake Avenue	1	2	I.S. 263 210 Chester St.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #27

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Anthony of Padua 125-18 Rockaway Blvd.	1 1	5 1	P.S. 123* 145-01 119th Ave.
St. Clement Pope 120-27 141st Street	2	5	P.S. 123* 145-01 119th Ave.
St. Rose of Lima 154 Beach 84th Street	1 1	5 1	P.S. 42 488 Beach 66th St.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #28

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Pius V 105-12 Liverpool Street	2	5	P.S. 50* 143-26 101st Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #29

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Immaculate Conception 179-14 Dalny Road	2 1	5 2	I.S. 238* 88-15 182nd St.
Incarnation 89-15 Francis Lewis Blvd	1	1	P.S. 134 109th Ave. & 203rd St.
Sacred Heart 115-50 221st Street	2 1	5 2	P.S. 147 218-01 116th Ave.
St. Catherine of Sienna 118-34 Riverton Street	1 1	5 3	P.S. 36 187-01 Foch Blvd.
St. Clare 137-25 Brookville Blvd.	1	2	P.S. 156* 229-02 137th Ave.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Gerard Majella 91st Avenue & 188th Street	1 1	5 3	I.S. 238* 88-15 182nd St.
St. Pius X 147-65 249th St.	1	1	P.S. 138 253rd St. & Weller Ave.
Linden SDA 137-01 228th Street	1	2	P.S. 156* 229-02 137th Ave.
St. Pascal Baylon 112-35 199th Street	2	5	I.S. 192

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #30

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Blessed Sacrament 34-20 94th Street	2 1	5 2	P.S. 127* 98th St. & 25th Av.
St. Gabriel 97th St. & Astoria Blvd.	1 1	5 3	P.S. 127* 98th St. & 25th Av.
St. Mary 10-24 49th Av.	1 1	5 1	P.S. 111 37-15 13th St.
St. Patrick 39-37 28th Street	1 1	5 4	JHS 204 36-41 28th St.
St. Rita 36-14 12th Street	1 1	5 3	P.S. 76 36-36 10th St.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #31

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Assumption 10 Kingsley Pl.	1	3	P.S. 16 80 Monroe Av.
Immaculate Conception 104 Gordon St.	1 1	5 1	P.S. 14 100 Tompkins Av.
Our Lady of Mt. Carmel-St. Benedicta 285 Clove Road	1	2	P.S. 19 780 Post Ave.
St. Peter Elementary 300 Richmond Terr.	1	4	P.S. 31 55 Layton Av.
St. Sylvester 884 Targee Street	1	4	P.S. 57 140 Palma Drive

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #32

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Our Lady of Lourdes 2-12 Aberdeen Street	2	5	P.S. 384 242 Carper St.
St. Brigid 438 Grove Street	1 1	5 1	JHS 291 231 Palmeto St.
St. Frances Cabrini 181 Suydam St.	3	5	I.S. 111 35 Starr St.
Pilgrim Christian Acad. 600 Central Av.	1	3	JHS 296 120 Covert St.
St. Elizabeth Seton 751 Knicker-bocker Ave.	4 1	5 4	P.S. 106 1314 Putnam Ave.

MATCHING OF NON-PUBLIC HIGH SCHOOLS TO PUBLIC HIGH SCHOOLS

June 2, 1986

DISTRICT - HIGH SCHOOLS

Non-Public High School	Rooms Needed	# of Days Per Week	Matching Public High School
LaSalle Academy 44 East 2nd Street N.Y. N.Y. 10013	1	5	Wash. Irving 40 Irving Pl NYC 10003
Cathedral H.S. 360 E. 56 Street N.Y. N.Y. 10022	3	5	H.S. of Art Design 1075 2nd Ave NYC 10022
St. Jean Baptiste 73 E. 75th Street N.Y. N.Y. 10021	2	5	Julia Richman 317 E. 67 St. NYC 10021

Non-Public High School	Rooms Needed	# of Days Per Week	Matching Public High School
St. Michael High 425 West 33rd St. N.Y. N.Y. 10017	1	5	H.S. for Humanities 351 W. 18 NYC 10001
Rice High 74 W 124th St. N.Y. N.Y. 10027	4	5	H.S. of Science & Mat - 116 St. & FDR Drive NYC 10029
Cardinal Hayes 650 Grand Concourse Bronx, NY 10451	3	5	Alfred E. Smith 333 E. 151 St. Bronx, 10451

June 2, 1986

DISTRICT - HIGH SCHOOLS

Non-Public High School	Rooms Needed	# of Days Per Week	Matching Public High School
St. Pius V. High 500 Courtland Ave. Bronx, N.Y. 10451	1	2	Samuel Gompers H.S. 455 Southern Blvd. Bronx, 10455
Msgr. Scanlan HS 915 Hutchinson Rv. Pk. Bronx, NY 10465	1	2	Herbert Lehman 3000 E. Tremont Ave. Bronx, 10461
Aquinas HS E. 182nd St. Bronx, NY	2	5	Wm. Howard Taft 240 E. 172 St. Bronx, 10457
St. Nicholas of Tolentine HS 2336 Andrews Ave Bronx, NY 10468	2	5	Theodore Roosevelt 500 East Fordham Rd. Bronx, 10458

Non-Public High School	Rooms Needed	# of Days Per Week	Matching Public High School
Bishop Loughlin 357 Clermont Ave. Brooklyn, NY	3	5	Bklyn Tech 29 Ft. Greene Place Bklyn, 11217
St. Joseph High 80 Willoughby St. Brooklyn, NY 11201	1 1	5 3	Bklyn Tech 29 Ft. Greene Place Bklyn, 11217

MATCHING OF NON-PUBLIC HIGH SCHOOLS TO PUBLIC HIGH SCHOOLS

June 2, 1986

DISTRICT - HIGH SCHOOLS

Non-Public High School	Rooms Needed	# of Days Per Week	Matching Public High School
Bishop Ford-Central 500 19th St. Brooklyn, NY 11215	2	5	John Jay 237 7th Ave. Bklyn, 11215
Beth Rivkah High 310 Crown St. Brooklyn, NY 11225	1	1	Geo. Wingate 600 Kingston Ave. Bklyn, 11203
Catherine McAuley HS 710 E. 37th St. Brooklyn, NY	1 1	5 2	Tilden HS 5800 Tilden Ave. Bklyn, 11203

Non-Public Schools Without A Matched Public School

June 2, 1986

MANHATTAN

District	Non-Public School	# of Rooms	# of Day/Week
6	Good Shepherd	2	5
	620 Isham Street	1	3
	Incarnation	3	5
	570 W. 175th Street		
	Our Lady Queen of Martyrs	2	5
	71 Arden Street	1	2
	St. Elizabeth	2	5
	612 W. 187th Street		
	St. Jude	2	5
	433 W. 204th Street		
	St. Rose of Lima	1	5
	517 W. 164th Street	1	3
	St. Spyridon Parochial	1	5
	120 Wadsworth Avenue	1	1

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EXHIBIT B (5 Pages)

Non-Public Schools Without A Matched Public School

June 2, 1986

BRONX

District	Non-Public School	# of Rooms	# of Day/Week
10	Our Lady of Angels	1	5
	2865 Claflin Ave.	1	3
	Our Lady of Mt. Carmel	5	5
	2467 Bathgate Avenue		
	St. Ann	1	4
	3511 Brainbridge Avenue		
	St. John	2	5
	3030 Godwin Terrace		
	St. Nicholas of Tolentine	2	5
	2335 University Avenue	1	3
	St. Philip Neri	1	3
	3031 Grand Concourse		
	Visitation	1	1

	171 W. 239th Street		
	Holy Spirit 1960 University Avenue	4	5
District	Non-Public School	# of Rooms	# of Day/Week
	Our Lady of Mercy	2	5
	2512 Marion Ave.	1	3
	Our Lady of Refuge	2	5
	2708 Briggs Avenue	1	1
	St. Martin of Tours	1	5
	695 E. 182 Street	1	1
	St. Simon Stock 2195 Valentine Avenue	3	5
11	S.S. Philip & James 1160 E. 213th St.	1	4
	St. Dominic 1684 White Plains Rd.	1	4

Non-Public Schools Without A Matched Public School

June 2, 1986

BROOKLYN

District	Non-Public School	# of Rooms	# of Day/Week
15	St. Agatha	2	5
	736 48th Street	1	1
	St. Michael	3	5
	4222 4th Avenue	1	2
17	Holy Cross	1	2
	2520 Church Avenue		
	St. Francis of Assisi	1	5
	400 Lincoln Road	1	2
	Beth Rivkah for Girls	1	4
	310 Crown Street		
	Beth Rivkah for Girls	1	1
	2270 Church Avenue		
	St. Mark's Day	1	3
	1346 President Street		
	Mt. Moriah	1	1
	1149 Eastern Parkway		

Non-Public Schools Without A Matched Public School

June 2, 1986

BROOKLYN - continued

District	Non-Public School	# of Rooms	# of Day/Week
	St. Johns Elementary 19 Winthrop Street	1	4
	Holy Spirit 5670 Sterling Place	4	5
18	St. Catherine of Genoa 870 Albany Avenue	1	2
22	Holy Innocents 249 E. 17th Street	2	5
	Our Lady of Refuge 1087 Ocean Avenue	1	5
	St. Jerome	2	5
	465 E. 29th Street	1	3
	St. Rose of Lima	1	5
	259 Parkville Ave.	1	2
	St. Vincent Ferrer 860 East 38th St.	1	2

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Non-Public Schools Without A Matched Public School

June 2, 1986

QUEENS

District	Non-Public School	# of Rooms	# of Day/Week
24	Our Lady of Sorrows 35-34 105th Street	2	5
	St. Aloysius	2	5
	360 Seneca Avenue	1	1
	St. Leo 104-19 49th Avenue	1	4
	School of the Trans 98-07 38th Avenue	1	5
27	St. Mary Star of the Sea 595 Beach 19th Street	1	5
	Torah Academy for Girls	1	1
	444 Beach 6th St.	1	2
	Yeshiva Darchei Torah 257 Beach 17th St.	1	2

28	Our Lady of the Cenacle	1	5
	87-25 136th St.	1	1

Non-Public Schools Without A Matched Public School

June 2, 1986

QUEENS - continued

District	Non-Public School	# of Rooms	# of Day/Week
28	Presentation of BVM	3	5
	88-13 Parsons Blvd.		
	St. Teresa of Avila	1	5
	109-55 128th St.	1	3
30	Hebrew Academy of W. Queens	1	5
	34-25 82nd Street	1	1

THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
BUREAU OF FINANCIAL AUDIT
BUREAU OF MANAGEMENT AUDIT
161 WILLIAM STREET
NEW YORK, N.Y. 10038

HARRISON J. GOLDIN
COMPTROLLER

ROGER D. LIWER
DIRECTOR OF AUDITS

April 26, 1988

Mr. Steven Schwager
Chief, School Business Executive
NYC Board of Education
110 Livingston Street
Brooklyn, New York 11201

Dear Mr. Schwager:

As you know, my office has been auditing the award by the Board of Education of a contract for mobile instructional units (MIUs) to the New York Bus Company. My staff had an exit conference with you and your staff an April 13, 1988 to discuss the audit findings and recommendations. At that conference you were informed of problems surrounding the award of the MIU contract. A

formal report of the audit findings and recommendations will be forwarded to the Board in the near future. The report will incorporate any relevant comments and additional information received at the exit conference. However, I would like to document some of the audit's preliminary findings at this time and to emphasize the need for the Board to act expeditiously on the audit's principal recommendation; that recommendation is that the current contract for MIUs not be renewed and that the contractor be advised of this action before April 30, 1988.

In essence, the audit found that the Board's acquisition of mobile instructional units was the end-product of a series of questionable decisions which resulted in the award of the entire MIU contract to the highest bidder.

At the outset, the Board did not decide whether it needed a stationary, trailer-like limit or a mobile vehicle type unit. Instead, it tried to combine elements of both into one unit. This resulted in inconsistent and conflicting design requirements, reduced competition and significantly higher unit costs.

The Board believed "time was of the essence" in acquiring MIUs, yet it did not procure standard, widely available vehicles - the quickest acquisition method. Instead, it designed and sought a custom vehicle - the longest acquisition method. The time needed to build the custom vehicle put the Board in a position where it could not correct deficiencies in its acquisition process or in the vehicles being built and still meet a court-imposed deadline for implementation.

Moreover, the Board never decided whether it was satisfied with its own design or wanted a design from an

outside vendor. This led to its issuing a bid proposal which combined elements of both a Request for Bid, which is commonly used to procure standard, off-the-shelf items, and a Request for Proposal, generally used to procure unique items. The Board's use of an RFB format, ostensibly to save time, was inconsistent with its decision to design and require a unique vehicle.

The bid proposal included a requirements contract (RC) clause. The RC clause stipulated that the Board would only pay for the vehicles used on any one day, even though the contract required the availability of 70 MIUs. If the Board wanted only 40 MIUs in service on one day, vendors would not be paid for the 30 not used. This clause caused a number of interested companies to decline to bid. The Board should have expected that few companies would expend a large capital outlay for a unique vehicle without some assurance of a financial return. In addition, the Board required a prototype, the expense of which again prevented some interested companies from bidding. In any event, the Board never inspected a working prototype of the contract winner's vehicle.

New York Bus has the entire current contract. Originally Daily Bus was to furnish twenty of the MIUs; it was later disqualified. The Board rejected a lower bid from Bernard Montgomery Co. on the highly technical ground of missing shop drawings, even though Montgomery submitted the Board's own drawings as its design and committed to providing detailed drawings within one week. In fact even Daily Bus' drawings were found inadequate but that company was given an extra week to correct them.

Montgomery's bid was $139.00 per day less than that of New York Bus. The Board would have saved $1.25

million over the 5-year contract had Montgomery been awarded a contract for the 10 MIUs on which it bid.

The New York Bus vehicle is unsafe. The polyurethane foam used in the vehicle, though it meets the Board's flammability specifications, emits a toxic gas when it burns. A protruding wheel housing in the aisle is a safety hazard. The exterior steps lack a handrail called for in the specifications and a stepwell cover must be manually removed to provide access to the steps. This could cause a serious delay in evacuating students during an emergency.

The audit recommends that the contract with New York Bus not be renewed for school year 1988-89, and that the Board re-bid for mobile units and/or stationary trailers, as suits its needs. The rebid specifications should clearly describe the basic standards for MIUs as established by the State Department of Education and include only those standards from City regulations which are truly relevant. The re-bid should be open to vendors with standard units and should not exclude the current contract holder or previous bidders, if their products are judged safe and can be available for the next school year.

The Board is contractually obligated to give New York Bus four months notice of non-renewal; April 30, 1988 is the deadline for this notice for the 1988-89 school year. Between April 30 and the start of the school year on September 1, with due diligence on your staff's part, much less costly alternatives to the current RC with New York Bus can be found.

I estimate that the dollar savings to New York City from re-bidding to MIUs and/or trailers would be approximately $2.9 million per year. This would result in

nearly $9 million saved over the life of the remaining three years of the New York Bus contract.

New York City is one of only two jurisdictions, San Francisco being the other, that uses uniquely designed, high cost MIUs. All other jurisdictions surveyed by my staff use much less expensive alternatives, as follows:

COMPARATIVE COST ANALYSIS OF STANDARD AND CUSTOM-BUILT MOBILE INSTRUCTIONAL UNITS

City	Cost Per Year Per Unit to Lease	Student Capacity
Standard Unit		
Buffalo	$18,106	9
East Ramapo, N.Y.*	19,995	8
Syracuse	17,000	12
Jacksonville, Fla.*	44,450	8
Yonkers	15,269**	12
Nyack	17,159	8
Rochester	10,900	8
Custom Unit		
New York City	$106,920	11

* Cost includes: drivers, insurance, gas, maintenance (in Jacksonville the teachers are also included.)

** Average cost over 3 years (lst year @ $19,000, 2nd @ $16,888, 3rd year @ $10,000).

Other jurisdictions, including Philadelphia, Pittsburgh, Detroit and Denver, purchased standard MIUs and trailers at prices ranging from $28,000 to $62,000, all less costly than the Board's yearly lease costs. San Francisco also purchased its MIUs, buying six standard vehicles at $45,000 each and three Custom designed vehicles for $62,000 each.

In order to determine whether other alternatives are available, my staff contacted 20 vendors in the Northeast region. Fourteen of the vendors can supply MIUs or trailers with less than four months lead time, as follows:

Company	Number of Mobile Units	Number of Stationary Units
Farber East	70	0
Ress Company	70	128
Education-in-Roads	70	128
Vehicle Modification	50	128
Ranger Company	40	120
Wolfington	5	0
Gelco Space	0	70
ABC Trailer	0	128
A to Z Equipment	0	170
Modular Building	0	128
Modular Systems	0	128
Zoubek Trailer	0	128
Acorn Equipment	0	128
Scotsman Company	0	128
Totals	305	1,412

Prices quoted by these vendors ranged from $12,000 to $24,000 a year for leasing one MIU, not including a driver, and from $3,200 to $7,200 a year for leasing one trailer. Purchase prices ranged from $40,000 to $90,000 per MIU and from $9,000 to $70,000 per trailer.

All fourteen vendors expressed interest in bidding on a contract for the 1988-89 school year. The six firms offering standard MIUs currently provide MIUs to other cities.

I am attaching a copy of the Board's resolution of award to New York Bus. As you can see, it allows you legally to act as I recommend.

Please feel free to call me if you need further information or there is some way in which I can be helpful.

Sincerely,

Roger Liwer

cc: Harrison J. Goldin, Comptroller
Robert F. Wagner, President, NYC Board of Education
Richard R. Green, Chancellor, NYC Board of Education
Paul Dickstein, Director, OMB
Barbara Gunn, Director, Office of Operations
Don McCabe, Audit Coordinator, OMB
Dorothy Prager, Assistant Director, Office of Operations
James Coney, Auditor General, NYC Board of Education

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing affirmation was served by fax on December 27, 1995, and by Federal Express on December 28, 1995, on each of the following:

Marilyn Richter, Esq.
Assistant Corporation Counsel
100 Church Street, Room 6-C-34
New York, NY 10007

W. Scott Simpson, Esq.
Trial Attorney
Civil Division, Room 986
Department of Justice
901 E Street, N.W.
Washington, DC 20044

and

Kevin T. Baine. Esq.
Williams & Connolly
725 Twelfth Street, N.W.
Washington, DC 20005

Dated: December 28, 1995

[Stanley Geller]
Stanley Geller

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants.

and

RACHEL AGOSTINI, et al.,

Defendant-Intervenors.

NOTICE OF MOTION BY DEFENDANT-INTERVENORS FOR RELIEF FROM JUDGMENT

78 CV-1750

PLEASE TAKE NOTICE that, upon the pleadings and proceedings herein, Defendant-Intervenors Rachel Agostini, et al., will move this Court, on February 16, 1996, at the United States Courthouse, for the Eastern District Court of New York, located at 225 Cadman Plaza East, Brooklyn, New York, for an order pursuant to Rule 60 of

the Federal Rules of Civil Procedure, granting relief from this Court's Judgment, dated September 26, 1985, and granting such other relief as to this Court seems just and proper.

Dated: New York, New York
December 19, 1995

WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, DC 20005
(202) 434-5000

By: [Kevin T. Baine]
Kevin T. Baine (KB 0710)

TO:

Stanley Geller
Counsel for Plaintiffs
750 Lexington Avenue
New York, NY 10022

W. Scott Simpson
Counsel for Defendant
United States Secretary of Education
U.S. Department of Justice
Civil Division - Room 986
Federal Programs Branch
P.O. Box 883
Washington, DC 20044

Paul A. Crotty
Corporation Counsel of the
City of New York
Attorney for Defendant Chancellor
100 Church Street
New York, NY 10007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, FLORENCE FLAST, HELEN HENKIN, HAZEL SMITH, DENISE KROUSER, and CHRISTINA WALKER,

DECLARATION
88 CIV. 96 (JG)

Plaintiffs,

-against-

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATIONAL; COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK; and CHANCELLOR and BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants,

-and-

JUAN B. COLON, LESLIE GREATHEART, LINDA WALLACE, CATHERINE AFFRONTI, and ANNIE MORALES RIVERA,

Defendant-Intervenors,

-and-

LEAH SAKS and BATYA TRAVIS,

Defendant-Intervenors.

---------- x

MARGARET 0. WEISS, declares, pursuant to 28 U.S.C. § 1746, under penalty of perjury under the laws of the United States of America, that the following is true and correct:

1. I am the Director of the Bureau of Nonpublic School Reimbursable Services of the Board of Education of the City School District of the City of New York. I am responsible for implementing various federal programs which provide instructional and support services to students who attend private schools within New York City. One of these federal programs is Chapter 1 of Title I of the federal Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C.§§ 2701, et seq. ("Chapter 1").

2. I have been an educator for over 31 years, and have worked in remedial education, as a teacher, supervisor and administrator, for over 27 years. I began my career as a third grade teacher in 1963 at the Sacred Heart Elementary School in Yonkers, New York. In 1965 I began working for the Board of Education of the City School District of the City of New York ("Board" or "Board of Education"). From 1965 to 1967 I taught English and from 1967 to 1972 I taught corrective (i.e., remedial) reading in Junior High School 149 in the Bronx.

3. In 1972 I became a field supervisor for corrective reading for the Chapter 1 (then called Title I) program for the Bureau of Nonpublic School Reimbursable Services ("the Bureau") and have continued to work in the Bureau to the present date. As a field supervisor, I provided on-site training and supervision for over 50 corrective reading teachers each year. In 1974 I became the

coordinator of the Chapter 1 Reading Skills Center program. In this position, I was responsible for implementing the Reading Skills Center program (which serves severely disabled readers), training and supervising the entire teaching and administrative staff of the program and developing courses of instruction for over 400 children. In 1979 I became Assistant Director of the Bureau, and in 1985 I became Director of the Bureau.

4. I hold a Masters of Science in Education and have completed an additional 30 graduate credits in School Supervision and Administration. I hold two professional licenses and two professional certifications from the New York State Education Department. I am licensed by the State as a common branches (i.e., elementary school) teacher and as a reading teacher, and hold certifications as a School Administrator and Supervisor and as a School Di-strict Administrator. I also hold four professional licenses from the Board of Education. I am licensed as a teacher of junior high school English and am licensed as an Education Administrator, senior level, in three separate license areas. I submit this declaration in support of the governmental defendants, motion for partial summary judgment.

Brief Overview of the Chapter 1 Program

5. Chapter 1 was first enacted in 1965. The statute provides federal funds for remedial, supplementary education and support services for elementary and secondary school students. To be eligible, a student must have below grade level educational achievement in reading and/or mathematics and reside within the attendance boundaries of a participating public school located in a low income area. (20 U.S.C. §§ 2721(a), 2723(a); 34 C.F.R§ 200.6(c).)

6. The statute has always provided that both public school and private school students are eligible for Chapter 1 services. Implementing regulations promulgated by the United States Department of Education ("DOE") required that private school students receive services that are "comparable" to those provided to public school students.

7. The original requirement that Chapter 1 services provided to public and private schoolchildren be "comparable, " has been expressed in more recent statutory enactments and regulations as a requirement that there be "equitable" participation of eligible students in the Chapter 1 program, without regard to whether they attend public or private schools. (20 U.S.C. § 2727(a), (b)(2); 34 C.F.R. § 200.50(a)(1).) However, the implementing regulations make clear that the requirements of comparability and equitability are essentially the same. (34 C.F.R. §§ 76.654(a), 200.71(b).)

8. Pursuant to the statute, Chapter 1 services are normally implemented by a local educational agency ("LEA"), under the supervision of a state educational agency ("SEA"). (20 U.S.C. §§ 2722(b).)

9. In New York State, the New York State Education Department ("SED") is the SEA. Pursuant to state law, the entire City of New York is one City school district, and the Board of Education is the policy-making body for the City of New York School District. (New York Education Law §§ 2590, 2590-b.1(a), 2590-g.) Accordingly, in New York City the Board of Education is the LEA.

10. It should be noted that the City is also subdivided into thirty-two community school districts, each of which has a community school board. A variety of

functions are delegated to the community school boards by the Board of Education. (New York Education Law §§ 2564, 2590, et seq.) A few of the community school districts administer a portion of the Chapter 1 funds that are allocated to serve the private school students in their districts. However, the Chancellor of the Board of Education, through my Bureau, administers the vast majority of the Chapter 1 funds that are allocated to private school students in New York City. Accordingly, except as otherwise noted, the numbers and other details provided herein refer to the Chapter 1 program for private school students administered by the Chancellor of the Board of Education and not by the community school districts.

11. By agreement of the parties, most of defendants' responses to plaintiffs' voluminous discovery requests were limited to the five year period beginning with the 1986-87 school year and ending with the 1990-1991 school year. Most of the data presented here accordingly concerns this five year period, which was the initial five-year implementation period of the program challenged in this case. However, the program has continued to the present and remains substantially similar to the program implemented during the initial five year period. To show this on-going substantial similarity, statistics are also presented for school year 1993-94, which is the most recent year for which complete statistics are available, since the statistics are fully collected and collated after the end of the school year.

12. The Board of Education is the largest LEA in the nation, and our Chapter 1 program is the largest in the nation. During the five school years beginning in 1986-87 and ending in 1990-91, the number of students served in the Chapter 1 program was: 1986-87 -- 152,193 public school

students and 10,737 private school students, for a total of 162,930 students; 1987-88 -- 150,458 public school students and 11,618 private school students, for a total of 162,076 students; 1988-89 -- 175,348 public school students and 13,368 private school students, for a total of 188,716 students; 1989-90 -- 191,798 public school students and 16,495 private school students, for a total of 208,293 students and 1990-91 -- 222,775 public school students and 18,120 private school students, for a total of 240,895 students. As federal funding for the program has increased, the program has continued to grow. In 1993-94, the program served 237,200 public school students and 21,897 private school students for a total of 259,097 students.

13. In this case, plaintiffs challenge the methods of delivering Chapter 1 services established to comply with the decision in Aguilar v. Felton, 473 U.S. 402 (1985) ("Aguilar"), which applies to students who attend religious schools. Approximately 99% of the private school students in our Chapter 1 program are affected by Aguilar. During the 1986-87 school year, the Board provided Chapter 1 services to 10,661 students from 141 schools affected by Aguilar. The figures in the following years were: in 1987-88, 11,542 students from 153 schools; in 1988-89, 13,270 students from 168 schools; in 1989-90, 16,371 students from 209 schools and in 1990-91 18,018 students from 242 schools. In 1993-94, there were 21,795 students from 237 schools affected by Aguilar.

Chapter 1 Services for Private Schoolchildren before the Aguilar Decision

14. The basic educational composition of Chapter 1 services for private school students, as provided by the Board of Education, has remained essentially unchanged,

from Chapter 1's inception in 1965 until today. Only secular, remedial instruction is provided. Instruction is given in three basic areas -- reading, mathematics and English as a Second Language.

15. In addition, the program provides clinical and guidance support services for eligible children who have emotional or family problems which interfere with their academic performance. The clinical services are provided by social workers and psychologists, and the guidance services by guidance counselors.

16. These same basic services have been provided over the three decades that the program has been in existence. These services have always been designed to supplement and not supplant the private schoolchildren's regular classroom instruction. As discussed below, what has changed over the years has been the methods by which the services have been delivered; the nature of the services provided has remained essentially unchanged.

17. The Board provides Chapter 1 services only to eligible students who attend private schools; it does not provide services to the private schools, nor to the general student populations of these schools.

18. When the program began, in 1965, the Board of Education provided Chapter 1 services to private school students "after school," that is, the services were provided after the students, regular school day was completed. However, it was quickly concluded that the after school services for private school students were not as effective as, and therefore not comparable to, the Chapter 1 services for public school students, which were provided during the regular school day. Both the students and teachers were

tired. In addition, parents had serious concerns about the younger children having to get home in the dark during the winter months, and older children had scheduling conflicts created by jobs and other activities. (Exhibit "3" in support of Plaintiffs' Motion for Summary Judgment, Affidavit Setting Forth the Chancellor's Fourth Bi-Monthly Report which Describes the Alternative Plan for September 1986 (hereafter "Pls. Exhibit 3"), ¶¶ 17, 18).

19. The Board of Education consulted with other LEAs around the country, and learned that other school districts were experiencing similar difficulties with after school Chapter 1 programs. Indeed, one district court subsequently found that an after school Chapter 1 program for private school students was not comparable to the regular school day program for public school students. Based on our own experience, and the reported experience of other school districts, the Board of Education concluded that Chapter 1 services for private schoolchildren should be provided during the regular school day, to ensure that they would be comparable to the regular school day Chapter 1 services for public schoolchildren.

20. Accordingly, after the first year of the program, the Board provided Chapter 1 services to all private schoolchildren during the course of their regular school day, by sending its teachers, guidance counselors, and other professional and instructional employees into classrooms in the private schools (including the religious schools). These classrooms were designated as Board of Education Chapter 1 rooms and used exclusively for the Chapter 1 program.

21. The Board's program was not atypical; beginning in 1965 or soon thereafter, throughout New York

State, and upon information and belief, throughout the nation, Chapter 1 services for children attending religiously-affiliated schools were largely provided by publicly employed teachers and other professionals inside the religious schools. (Letter dated July 12, 1985 from Gordon Ambach, Commissioner of SED, to William Bennett, Secretary of DOE, annexed hereto as Exhibit "A:")

22. On July 1, 1985, in Aguilar v. Felton, 473 U.S. 402 ("Aguilar"), the United States Supreme Court determined that it was a violation of the Establishment Clause of the First Amendment for Board of Education teachers, guidance counselors, and other professional employers to provide Chapter 1 services (other than diagnostic services) inside the religious schools.

Developing Alternative Service Delivery Methods After Aguilar

23. During the 1984-85 school year, the Board provided Chapter 1 services to 172,263 public school students and 21,958 private school students, for a total of 194,221 students. The 21,958 students attended 253 private schools; of these, 252 schools with 21,906 participating students were affected by Aguilar. This meant that new methods of delivering Chapter 1 services had to be devised for these nearly 22,000 private schoolchildren. (As used hereafter in this declaration, the term "private school" refers to those schools whose students' receipt of Chapter 1 services is affected by Aguilar.)

24. Faced with the impossible task of creating and implementing these alternative service delivery methods in the two months before the start of the school year, the Board sought a stay of the judgment. In September 1985,

the district court granted the application and stayed its judgment until the beginning of the 1986-87 school year, to give the Board an opportunity to develop alternative means of delivering Chapter 1 services to private school students. The district court's judgment was subsequently affirmed by the Second Circuit. (Judgment, Betty-Louise Felton, et al. v. Secretary, United States Department of Education, et al., Civil Action No. 78 CV 1750 (ERN), slip op. at 3-4 (Sep. 26, 1985), aff'd., 787 F.2d 35 (2d Cir. 1986).) As a result of the stay, which allowed a continuation of the pre-Aguilar program, the number of private school students that were served under Chapter 1 in the 1985-86 school year did not differ significantly from the number served during 1984-85.

25. By memorandum dated July 22, 1985, SED identified four possible alternatives to face-to-face instruction in the schools, for the delivery of Chapter 1 services to private schoolchildren. These four suggested alternative methods for the provision of Chapter 1 services were: 1) in public schools; 2) in neutral sites; 3) in mobile or portable vans equipped as classrooms or 4) through instructional technology. (Memorandum dated July 22, 1985 from Robert D. Stone, General Counsel of SED to District Superintendents, etc., annexed hereto as Exhibit "B").

26. These four alternative delivery methods suggested by SED, are the four delivery methods which the Board has used in response to Aguilar ("post-Aguilar delivery methods"). For purposes of this declaration, the four methods are referred to as: (1) "public school sites"; (2) "MIUs," which are mobile instructional units; (3) "leased sites," which are sites leased by the Board of Education from private entities and (4) "CAI," which is "computer-assisted instruction."

27. The Board has used public school sites, leased sites and MIUs since the 1986-87 school year, when post-Aguilar delivery methods were first implemented. The Board began using CAI in the 1987-88 school year.

28. A short summary of how these post-Aguilar delivery methods were developed will illustrate some of the educational, logistical, financial and legal considerations and constraints which affected the delivery of Chapter 1 services to religious school children after Aguilar.

29. In terms of both educational and cost effectiveness, providing Chapter 1 services to students inside their own schools, is preferable to using the post-Aguilar delivery methods. As Judge Friendly observed in the Aguilar litigation, the alternatives "are almost certain to be less effective, more costly, or both." Felton v. Secretary, U.S. Dep't. of Educ., 739 F.2d 48, 71 (2d Cir. 1984).

30. Of greatest concern is the time spent by students in moving between their regular classroom and their Chapter 1 site. This is time lost from their regular classroom instruction and is especially serious for Chapter 1 students, since they are the students who are most in need of instruction. The public school site and leased site alternatives often entail significant travel time.

31. Additional instructional time loss and disruption is caused for both the Chapter 1 students and their regular school classmates because Chapter 1 students have to leave their school buildings to receive services at the public school sites, leased sites and MIUs, and therefore have to put on and remove outer garments. This is not a trivial disruption, since most of the Chapter 1 private school students are in the elementary school grades, and this task is

often a major undertaking for young children in the winter.

32. Another consideration is safety. Most of the private schools are located in low income neighborhoods, as are most of the alternative Chapter 1 sites. Many of these neighborhoods have high rates of violent crime. An MIU parked on the street in a high-crime area is more exposed and not as secure as a school building. Walking or even driving children through high-crime areas raises safety considerations. In fact, since the post-Aguilar delivery methods were instituted, a few incidents have occurred which were upsetting to the students, but fortunately resulted in no harm. There was a sniper outside one school when the students were scheduled to be leaving, gangs have threatened some students, and drug dealing has occurred in the vicinity of students. The Board has considered the levels of violence and crime in particular neighborhoods in determining the appropriate method of service delivery for students of a particular school.

33. CAI is interactive computer technology. Children work at computers installed in their regular private school. To comply with Aguilar, there is no teacher present. The student's computer work is monitored electronically by a Board of Education teacher who is located in a Board office in Brooklyn. The teacher can electronically adjust the computer lessons based on the student's progress, but there is no face-to-face interaction.

34. The CAI alternative avoids the instructional time loss, disruption and safety concerns created by the off-site post-Aguilar delivery methods discussed above. However, while CAI has educational value, it is not as educationally effective as direct face-to-face interaction between student and teacher. Although as a group, the

Chapter 1 private school students who receive only CAI instruction do meet SED's educational gain standards for the Chapter 1 program, they do not perform as well overall as the students who receive face-to-face instruction.

35. Finally, there are financial concerns. Each of the alternative delivery methods entails costs which were not incurred under the pre-Aguilar in-school teaching method.

36. As discussed above, the Chapter 1 statute and regulations require that the services provided to private and public schoolchildren be "equitable." In August 1985, DOE issued a written Guidance on Aguilar v. Felton and Chapter 1 (a copy of the Guidance is annexed to the Declaration of Thomas Fagan as Exhibit B.) In question and answer number 4, the federal government stated that an LEA's Chapter 1 application could not be approved, and Chapter 1 funds could not be expended, unless the LEA's Chapter 1 program provided for equitable services to private school children. Thus, the Board was legitimately concerned that if its post-Aguilar Chapter 1 services for private schoolchildren were not equitable, its entire Chapter 1 program would be jeopardized. The Chapter 1 program at that time served over 170,000 public schoolchildren in New York City.

37. In light of the Board's prior experience that after school Chapter 1 programs were not as educationally effective as programs held during the regular school day, and the Board's continuing provision of Chapter 1 services to public schoolchildren during the regular school day, it was determined that an after school program for private schoolchildren raised serious legal concerns about equitability. (Pls. Exhibit 3, ¶¶ 13-19)

Public School Sites

38. A public school site is a room or rooms in a public school that are used to provide Chapter 1 services for private schoolchildren. The rooms may be located anywhere in the building; there are no requirements that the Chapter 1 rooms be together in one wing or area, and there are no doors or other physical structures erected between Chapter 1 and other rooms. Indeed, some rooms which are not used the entire day for Chapter 1 instruction, are used for other purposes by the public school when the private school students' Chapter 1 classes are not in progress. There are no separate entrances or hallways used exclusively by the private school students.

39. Obtaining public school sites for use during the regular school day is difficult, because of lack of space in many public schools, and the educational and logistical problems created by transporting children to and from a public school site. In 1985-86, overcrowding was so severe in some public schools, that certain public schools were busing their own students to different schools for the entire school day. As discussed further below, the space shortage in public schools has become far worse since 1986.

40. In addition, as discussed above, the use of public school sites creates a loss of instructional time, which is a serious concern for these students. The Board therefore sought to minimize travel time, and established a maximum one way vehicular travel time between the two schools of ten minutes. In New York City, travel time is a function of both distance and traffic conditions, although as a general rule, the longer the distance the longer the travel time. The necessary limitation on travel time further restricts the availability of appropriate public school sites. Insofar as an alternative site is closer to the private school than is the public school site, it is educationally preferable to use the

alternative site. (Pls. Exhibit 3, ¶¶ 21-23)

41. To minimize the loss of instructional time, most private school students are transported between the private school and the Chapter 1 public school site by mini-vans or buses. These vehicles are owned and operated by private companies which are under contract to the Board to transport students between their homes and schools at the beginning and end of the school day, and are thus available for Chapter 1 purposes during the intervening hours of 9:10 a.m. to 2:30 p.m. Private school students who attend a public school site which is within one block of their own school normally walk. (Pls. Exhibit 3, ¶¶ 23-25)

42. For the 1986-87 school year, the Board was able to offer Chapter 1 services at public school sites to students attending 194 private schools. The students in 52 private schools accepted this offer. The number of private school students who participated in the Chapter 1 program in the 1986-87 school year, decreased by approximately 50% from the number who participated in the 1985-86 school year.

43. Objections to the public school sites, as expressed by many private school principals, included: the loss of instructional time caused by travel (it was noted that the travel time computed by the Board was just for travel between the two schools, and that additional time was lost in walking to and from classrooms, particularly those on upper floors); drug dealing and other criminal activities near the private school, the public school or both; heavy traffic and high accident rates on the route; and the reluctance or unwillingness of many parents to have their children leave their school building or travel during the school day. Some private school principals indicated that their students would

attend public schools that were closer to the private school than the public school site offered; however there was no available space in those pubic schools.

44. Since the post-Aguilar delivery methods were instituted, there has been a continuing decline in the number of public school sites which have been utilized in the Chapter 1 program. Thus, over the initial five year period using the post-Aguilar delivery methods, the number of public school sites utilized decreased from 49 to 18. Most of this decrease was due to increased overcrowding in the public schools. Of the 31 public school sites which were lost during this five year period, 20 were lost because the public school needed the classroom space for its own students regular educational program.

45. In school year 1986-87, 3,578 students attending 52 private schools received their Chapter 1 services at 49 public school sites. In subsequent school years, the figures were as follows: in 1987-88, 2,508 students from 42 private schools received services at 39 public school sites; in 1988-89, 2,591 students from 39 private schools received services at 37 public school sites; in 1989-90, 1,928 students from 29 private schools received services at 27 public school sites; and in 1990-91, 1,578 students from 20 private schools received services at 18 public school sites.

46. Over the following three school years, 4 public school sites were dropped and 1 was added. Of the 4 public school sites that were dropped, 3 were lost because the public school needed the classroom space for its own students. During 1993-1994, 1,219 students from 16 private schools received services at 15 public school sites

47. I am informed by counsel that plaintiffs have

taken the position that defendants should provide Chapter 1 services to private school students at public school sites, in classes composed of both public and private school Chapter 1 students. Both before and after the Aguilar decision, all Chapter 1 classes, with one exception, have always been composed of students from the same school. (The exception was an English as a Second Language program given at a leased site. Two private schools each had a small number of eligible students and it was possible, and more efficient, to conduct classes for children from both schools.)

48. Plaintiffs' proposal would be impossible to implement. First, there is simply no room in the New York City public schools for all private school Chapter 1 students, who now number almost 22,000. This was true even when the Board first implemented its post-Aguilar delivery methods in September 1986, since then, the overcrowding situation has become much worse. (Of course, plaintiffs, alternative proposal, that all private school students receive their Chapter 1 instruction as the last class of the school day, would require far more space than if services were provided throughout the school day. It would also be extremely difficult to staff plaintiffs' proposed end-of-school-day program; Chapter 1 teachers now teach 4-5 classes per day, pursuant to their union contract. It is hard to imagine how staff could be scheduled under plaintiffs' proposal.)

49. As of October 31, 1986, the student enrollment in New York City's public schools was 940,208. As of October 31, 1994, the student enrollment was 1,034,235, an increase of 94,027 public school students. This is an increase of 10%, in just 8 years.

50. As is fully described in a January 1995 report by the Comptroller of the City of New York, Overcrowding

in New York City Public Schools: Where Do we Go from Here? (a copy is annexed hereto as Exhibit "C"), public school overcrowding became particularly severe starting in the late 1980's. The major cause has been a rapid increase in enrollment growth since 1989. In addition, in 1988, the Board significantly reduced class sizes, which further increased overcrowding. The rate of increased enrollment is now 21,000 students per year, due primarily to immigration and the high number of births. The current growth rate is expected to continue into the next century. (Exhibit "C," pp. ES1, 1, 3 (figure 2).)

51. As the Comptroller's Report indicates, the system is now so crowded that 90,000 students, which is 9% of the public school population, lack regular classroom seats. Since the construction of new school buildings is too costly and too slow a process to address the great and growing space need, other solutions, some drastic, are being explored. These include double shifts (students attend school on different shifts), a year-round school calendar and large-scale busing of students to other, underutilized schools. (Exhibit "C," pp. ES1, 30-50)

52. In terms of plaintiffs' proposal that the almost 22,000 private school students now enrolled in Chapter 1 be served in public school sites, the overcrowding situation is even worse than the overall figures suggest, since a majority of the Chapter 1 private school students attend school in areas where the public schools are most overcrowded. In the 1993-94 school year, 59% of the private school Chapter 1 students attended schools which were located in the 15 most overcrowded community school districts. As explained in the Comptroller's Report, increased immigration is the major cause of the increase in enrollment, and immigrants frequently congregate in particular neighborhoods. As a

result, the overcrowding is far more severe in some areas than in others. (Exhibit "C," pp. 4-8, 12-22). Since eligibility for Chapter 1 includes a requirement that the student reside within the attendance boundaries of a participating public school in a low income area, the Chapter 1 programs are also concentrated in certain areas, which are often areas where large numbers of immigrants reside and the public schools are most crowded.

53. In addition to the overcrowding problem, plaintiffs' proposal that private and public Chapter 1 students be integrated into Chapter 1 classes located in the public schools is educationally unsound and logistically unworkable.

54. First, there would be serious educational problems in integrating students from different schools in one Chapter 1 class. If, for example, in an integrated Chapter 1 remedial mathematics class, the students from the public school were working on division in their regular class, while the students from the private school were working on multiplication in their regular class (which is always taught before division), there would be no way to effectively supplement the math instruction and learning of both sets of students. Plaintiffs' proposal would thus violate the state and federal guidelines and mandates, discussed below and in the declaration of Michele Nowosad, that Chapter 1 instruction be coordinated with the students' regular classroom instruction.

55. Another educational problem would arise when the nearest proximate public school with a comparable program for the same grades in the same subject areas was a long distance from the private school. If the travel time becomes excessive and there is a significant loss of regular instructional time for the private school students, then, as

discussed above, that is a significant educational problem and raises concerns regarding the equitability of the services.

56. In addition, it would be impossible to synchronize the schedules of the approximately 22,000 private school students and 237,000 public school students enrolled in Chapter 1, who attend hundreds of different schools. First, the schools' calendars are different. The private schools generally start and end the school year earlier. Second, many of the private schools close for religious holidays on days when the public schools are open and Chapter 1 instruction is given in the public schools. (Although the public schools are closed for major Jewish holidays due to staffing problems, most private Hebrew Day Schools observe additional holidays.) Third, the starting and ending times of school days varies by school. Some private schools start and end their school day earlier than most public schools, while some private schools end their school day later than most public schools. Finally, due to overcrowding, the Board has implemented double shifts in a significant number of public schools, and is now considering expanding this practice because of the growing space shortage. (Exhibit "C," pp. 38-42) In a double shift system, the school day is either earlier or later than the usual school day.

57. In addition, private schoolchildren are sometimes delayed by traffic while traveling to their Chapter 1 sites. Under plaintiffs' proposal, the Chapter 1 teacher could either wait for the private schoolchildren, thereby diminishing the public schoolchildren's instructional time unnecessarily, or start without the private schoolchildren, which would create instructional problems when they arrived in the middle of the lesson.

58. Further difficulties would result from internal scheduling differences between schools. A private school may schedule lunch hour for its fourth graders at 12:30 p.m., while the closest public school with a Chapter 1 program for fourth graders may schedule lunch for this grade at 11:30 a.m. Assemblies for the fourth grade may be scheduled for different days and times at the different schools. Either the public school would have to accommodate its schedule to the private school, or public officials would have to seek a rescheduling of the private school's regular program, which raises a concern regarding government intrusion into the private school's program.

59. Significantly, the regular classroom instruction in the Chapter 1 area, mathematics for example, might be scheduled for different times of the day in the private and public school classes whose students are to be integrated. If students were to miss this regular classroom instruction, not only would it be educationally counterproductive since they require remediation in the subject, but it would be contrary to the statutory requirement that Chapter 1 supplement but not supplant the regular classroom education.

60. Another problem is the different educational methods and programs used in providing Chapter 1 services to public school students. As is more fully explained in the declaration of Michele Nowosad, Chapter 1 services for public school students are provided through a variety of instructional methods and programs which are not used for private school students and which cannot be integrated with the Chapter 1 services provided to private school students. Examples are prekindergarten programs, programs for neglected and delinquent children and schoolwide projects. None of these programs are provided to private school students.

61. Further, both the state and federal governments have been advocating increased use of the "Push-in" method for Chapter 1 instruction in the public schools. In this method, the Chapter 1 and regular classroom teachers jointly teach the entire class, with special emphasis on the needs of the Chapter 1 students. Not only would it be disruptive for private school students to join such a class for a period, but the instruction usually occurs in a full class, so there would frequently be no room to add students from the private schools. Similar problems would arise with the "Pull-aside" method of providing Chapter 1 services, which is used for public but not for private school students. In this method, the Chapter 1 teacher provides services by "pulling aside" the Chapter 1 students to the side or the back of the regular classroom.

62. Finally, integrating the private and public school students' Chapter 1 classes would be an accounting nightmare, if not an impossibility. The Chapter 1 statute and regulations require that Chapter 1 funds be allocated into two separate "pots" for public and private school (including non-sectarian private school) students, based on the proportional number of eligible students in each group. The expenditure of these funds is subsequently reported to, and reviewed by SED, always within the framework of whether the funds were drawn from the private or public school allocation.

63. The impossibility of maintaining this required accounting system under plaintiffs' proposal can be shown by some examples. If a Chapter 1 teacher has classes composed of students from both public and private schools, and during the course of the year, at various times, 2 private school students and 3 public school students leave her classes, because their families move, etc., then computing

what portion of her salary should be attributed to the public and private school allocations becomes extremely difficult. If a teacher holds a parent workshop, and 60% of the parents who attend are public school parents, whereas the class contains only 50% public school student's, how is that time allocated? The situation of the guidance counselors, school social workers and psychologists might be even more complex, since their sessions with students may vary over time in accordance with the students, needs. These employees might need to keep detailed time sheets, as though they were recording billable hours. Even if such data could be obtained, tabulating it for the thousands of employees who work in the public and private school Chapter 1 program in New York City would be a mind-boggling task.

Mobile Instructional Units ("MIUs")

64. As discussed above, when the Board first created its post-Aguilar delivery methods for the 1986-87 school year, there were many more public school sites available than in subsequent years. However, even in 1986, no appropriate public school sites could be found for the Chapter 1 students of 48 private schools.

65. Accordingly, mobile instructional units were obtained for these eligible private school students. Based on the number of Chapter 1 students in these private schools, and the types of services provided to these students, it was determined that 70 MIUs would be required.

66. Approximately 50% of the MIUs serve students at more than one private school, often on the same day. Some MIUs serve students from schools of different religious affiliations on the same day.

67. The mobile instructional units are large vehicles equipped as classrooms. They have been specially designed to comply with the stringent York City, health and safety code requirements for space occupied for the instruction of children.

68. The MIUs have also been specially designed to meet the needs of the Chapter 1 program. Under SED guidelines, which apply to both public and private school students, the maximum size for a Chapter 1 class with one teacher is 10 students. However, space is also required for students' sessions with guidance counselors, social workers or school psychologists, and for conferences between Chapter 1 staff and private school staff or private school parents. In addition, classes in English as a Second Language usually have no more than four students. Since the Board sought to maximize the use of each MIU, and thereby minimize the number of MIUs and their total cost, the interior of each MIU contains a folding partition. When the partition is closed, the larger section can accommodate a class of 10 students and a teacher, and the smaller section, which seats 4 younger or 3 older students, can simultaneously accommodate either an English as a Second Language class, or a guidance session, or a parent-teacher conference, etc. If the MIUs had not been constructed in this manner, then 2 MIUs rather than 1 would be required to accommodate this simultaneous activity.

69. The Board designed specifications to meet the applicable code requirements and educational needs, and then solicited competitive bid proposals from private contractors for the leasing of MIUs. The Board had no facility in which a large number of vans could be garaged, stored, cleaned, repaired and maintained. Other school systems had found such facilities very expensive to build and operate, and in

their experience, vandalism and insurance coverage were also expensive.

70. Accordingly, the MIU contract requires that the supplier also provide garage, maintenance, repair, cleaning, security and insurance. The contract further requires the supplier to build and maintain spare vehicles, which can be used as replacements when necessary, to avoid disruptions in service. Finally, the contract requires that the supplier provide a driver for each MIU, who not only drives the MIU between the garage and the private school, but remains in the MIU or the area surrounding the MIU during the school day to provide security. Security is a serious concern in regard to the MIUs, since they are parked in the open on public streets, usually in high-crime areas. There have been incidents, including one shooting, which occurred right outside an MIU.

71. The MIU contract was awarded to Ferdinand Arrigoni, Inc., which uses the trade name New York Bus Service. Ferdinand Arrigoni, Inc. is a private company. I have verified that the company is not owned or operated by a religious organization.

72. Four color photographs, showing the exterior and the interior of MIUs leased from Ferdinand Arrigoni, Inc. are annexed hereto as Exhibit "D." (Plaintiffs have annexed black-and-white xerox copies of some of these photographs to their motion papers at Exhibit "10.") The serious security concerns associated with the MIUs are reflected in the design of these vehicles. As the photographs show, the windows in the classroom areas are all relatively high and small, and the windows are covered with a heavy wire grid.

73. As can be seen from these photographs, the exteriors of the MIUs bear the words "New York Bus Service" in large, contrasting, highly-visible lettering. These words appear on all four sides of each MIU. In addition, two sides of the exterior of each MIU bear a circular decal, 18 inches in diameter, with the seal of the Board of Education. There are no religious symbols on either the interiors or the exteriors of the MIUs.

74. The MIUs do not obtain electricity from the private schools; each MIU carries a generator which supplies all electrical power. There are no telephones in the MIUs. Each MIU is equipped with a walkie-talkie, which is used by the driver for emergency communication with the private school regarding, for exampie, a security concern or an unexpected delay in releasing the students for a Chapter 1 class. The MIU driver takes one of the walkie talkie units into the private school office at the beginning of the school day and retrieves it at the end of the day.

75. There is storage space on the MIUs for equipment, material and supplies. However, since the space is not unlimited, the Chapter 1 teacher usually stores surplus supplies and materials in the private school. As the need arises, the teacher replenishes her supplies and materials from this surplus stock. On average, our teachers replenish their supplies from this surplus stock approximately once a month, or even less frequently.

76. There are no bathrooms, lunchrooms or infirmaries on the MIUs. If the MIUs contained such facilities, they would have been far more costly. In addition, their size might have been too unwieldy for driving and parking on New York City's public streets.

77. The maintenance and operation of the MIUs are under the sole control of New York Bus Service at all times, including the time when they are used to provide Chapter 1 services to private school students. The educational use of the MIUs is under the sole control of the Board of Education at all times.

78. The MIU drivers wear badges and uniforms, approved by the Board of Education, which indicate that they are employees of New York Bus Service. Other personnel who work on the MIU are a Board of Education Chapter 1 teacher, and sometimes a Board of Education Chapter 1 guidance counselor, social worker and/or psychologist. These personnel are assigned to MIUs without regard to their religious affiliation, if any.

79. When in service, the MIUs are parked on a public street near the private school whose students are receiving services; the MIUs are never parked on private school property. The exact parking space for each MIU is determined by the New York City Department of Transportation, which must consider such factors as the location of fire hydrants, the safety requirement that the doors to the MIU open to the curb rather than the street (which creates siting limitations on one-way streets) and the preference to keep the street area directly in front of the school entrance free of parked vehicles, again for safety reasons. Accordingly, the MIUs are not generally parked directly in front of the school entrance, but are parked either on the same block as, or around a corner from, an entrance to each private school.

80. When not in use for Chapter 1 purposes, the MIUs are driven to and stored in a private garage or storage facility owned or leased by Ferdinand Arrigoni, Inc. The

MIUs remain garaged during evenings, weekends, and private school summer breaks and holidays.

81. The only instruction provided in MIUs is secular Chapter 1 instruction. They are not used for instruction in religious subjects, nor for the private schools, educational programs.

82. During the school years 1986-87, 1987-88 and 1988-89, the Board of Education leased 70 MIUs. The Board then entered into an agreement to lease an additional 58 MIUs, which were delivered over a period of time. By the end of 1989-90, the Board was leasing 92 MIUs, and by the end of 1990-91, the Board was leasing 128 MIUs. No additional MIUs have been leased since that time; indeed, in the 1994-95 school year, the number of MIUs was reduced to 126.

83. The number of private school students who received Chapter 1 services in MIUs were: in 1986-87, 5,503 students from 72 private schools; in 1987-88, 5,546 students from 72 private schools; in 1988-89, 5,843 students from 71 private schools; in 1989-90, 7,733 students from 96 private schools and in 1990-91, 9,296 students from 138 private schools. In 1993-94, 11,622 students from 141 private schools received services in MIUs.

Leased Sites

84. A leased site is a building or part of a building that the Board leases and uses to provide Chapter 1 services to private school students.

85. From the time of the Aguilar decision to the beginning of the 1986-87 school year, the Board made

inquiries concerning nearly 500 potential leased sites. Of these, only about 150 sites had available space which might be suitable for classroom occupancy; all 150 sites were inspected. Approximately 475 of the original 500 potential Leased Sites were rejected for one or more reasons: they were not religiously neutral; they had no space available for Chapter 1 purposes; the landlord was unwilling to rent the site to the Board; they were unsuitable for classroom instruction or they would have required extensive, lengthy, and costly renovations. (Exhibit "4" in support of Plaintiffs' Motion for Summary Judgment, Supplementary Affidavit to the Chancellor's Fourth Bi-Monthly Report which Described the Alternative Plan for September 1986 (hereafter "Pls. Exhibit 4"), ¶¶ 18-20.)

86. Of the original 500 potential leased sites, 190 were owned by religious organizations. The Board rejected 141 of these 190 sites because they were not religiously neutral.

87. The Board carefully inspects every potential leased site as to its religious neutrality. The Board approves leased sites without regard to the religious affiliation, if any, of the owner.

88. Neither the interiors nor the exteriors of the buildings where the leased sites are located bear any visible religious symbols. If such symbols are present, they are either removed or covered. The leased sites are identified as Board of Education facilities, with signs measuring approximately 2 feet by 1-1/2 feet that read: "New York City / Board of Education / Chapter 1 Facility".

89. Each of the Board's leased sites is within a building or is an entire building, that is separate from the

private school building(s) whose students are served at the sites.

90. Near the beginning of the 1986-87 school year, the Board leased thirteen sites to provide Chapter 1 services to private school students. These thirteen sites were available quickly and inexpensively. They were either ready for use as classrooms or could easily be made ready by the installation of minor items such as a new lock or a fire alarm. (Pls. Exhibit 4, ¶ 22.)

91. Of these thirteen sites, eleven were part of a building (some as small as one room) and one was an entire building. The final site was in a building which was completely leased and occupied by the Board. One part of the building was leased and used for Chapter 1 services for private school students. The rest of the building was leased by the Board for special education programs for public school students. In 1990, the Board purchased the latter building, and continues to use it for special education for public school students and for Chapter 1 services for private school students. Although the building is now a public school, the space used for Chapter 1 continues to be treated as a "leased site, " for administrative purposes and it will be so categorized in this declaration.

92. Of these thirteen leased sites, twelve were closer to at least one of the private schools whose students they served than was the nearest public school with available space (and the thirteenth site was approximately the same distance). The use of these leased sites thus reduced the travel time and increased the regular classroom instructional time for the students. (Pls. Exhibit 4 ¶ 24).

93. The only activity which occurs at each leased

site is secular Chapter 1 instruction. The leases for these sites provide that, for the duration of the lease, the Board of Education has exclusive use and occupancy of the leased site and no religious activity or instruction will occur anywhere in the building where the site is located.

94. Of the 13 sites that the Board leased near the beginning of the 1986-87 school year, 11 were owned by Roman Catholic organizations; 1 was owned by a Jewish organization; and 1 was owned by a secular corporation. During the subsequent school years the figures were: 1987-88 -- 12 leased sites, 10 owned by Roman Catholic organizations, 1 by a Jewish organization and 1 by a secular corporations 1988-89 -- 9 leased sites, 7 owned by Roman Catholic organizations, 1 by a Jewish organization and 1 by a secular corporation; 1989-90 -- 9 leased sites, 7 owned by Roman Catholic organizations, 1 by a Jewish organization; and one by a secular corporation and 1990-91 -- 10 leased sites, 6 owned by Roman Catholic organizations, 1 by a Jewish organization, 2 by secular corporations and 1 by the Board of Education.

95. The number of private school students who received Chapter 1 services in leased sites were: in 1986-87, 1,580 students from 17 private schools; in 1987-88, 1,353 students from 14 private schools; in 1988-89, 1,117 students from 13 private schools; in 1989-90, 1,093 students from 14 private schools and in 1990-91, 1,012 students from 13 private schools.

96. The use of leased sites has continued in similar fashion. In the 1993-94 school year, there were 11 leased sites, 6 were owned by Roman Catholic organizations, 3 by Jewish organizations, 1 by a secular corporation and 1 by the Board of Education. In 1993-94, 1,601 students from

14 private schools, received Chapter 1 services in leased sites.

97. The leases for the thirteen original sites provided that the Board would use the sites rent-free until January 1987. The annual rental for these thirteen sites was $4.75 per square foot, which was at the low end of the range of the Board's usual cost for similar leased space.

98. Under the terms of the leases, the owners of the sites are responsible for the costs of cleaning, maintaining, and repairing the sites. I am informed that plaintiffs assert that the Board is responsible for the cost of bringing the sites into compliance with New York City codes for classroom occupancy, and that plaintiffs submit Board of Education resolutions which support this conclusion. (Pls. Exhibit "25.") The pertinent boilerplate provision of these resolutions states that "the cost of such work will be paid by the Board of Education, pursuant to the terms of the lease." The lease terms provide that the owner is responsible for the cost of such work. (A typical lease agreement used for the leased sites is annexed as Exhibit "E." The pertinent provisions are at Articles 7 and 12 of the lease and the 7th, 90th and 14th paragraphs of the Board of Estimate resolution authorizing the lease, which is annexed to the lease as Attachment A.)

99. However, it is insignificant whether the Board or the owners are responsible for paying these costs, since there were no leased sites in which any substantial work was performed to make the sites code compliant. The only work performed has been the installation of minor improvements, such as the installation of a few fire alarm boxes and panic hardware (i.e., a horizontal bar mounted on a door that, when pushed, allows egress through a door that is locked

from the outside). The Board did pay for these few minor improvements. However, if upon inspection of a potential site, the Board discovered that work other than the installation of such minor items was required to achieve code compliance, the Board did not lease the site. In two instances, after a site was leased, it was discovered that there were problems which would have required substantial work. In one leased site, which was occupied for a few months, an asbestos problem was discovered. In the other leased site, serious leaks developed after the Board had occupied the site for a number of years. In both cases, the Board terminated the lease for the site upon learning of the problem. The lease provides for termination by the Board upon thirty days, notice (Exhibit E, Article 4).

Computer-Assisted Instruction

100. In computer-assisted instruction ("CAI"), private school students receive Chapter 1 instruction through computers that are linked by modem or by dedicated telephone lines to a Board of Education office. The Board began using CAI to serve private school students in the 1987-88 school year.

101. CAI utilizes both desk-top computers that are installed in the private schools, usually in dedicated rooms used exclusively for CAI (referred to as "CAI rooms"), and lap-top computers that are distributed to private school students for use at home.

102. Chapter 1 teachers are not present in the private school during CAI use. When students use the computers installed in the private schools, data recording their work is transmitted electronically to a Board of Education office, where Chapter 1 teachers monitor the

students' work, print and review reports of their progress, and adjust each student's curriculum as appropriate.

103. Through the 1993-94 school year, the two Board of Education offices where Chapter 1 teachers were located were at 347 Baltic Street and 49 Flatbush Avenue, both in Brooklyn. (One office was recently relocated to another Brooklyn site.) The CAI system was designed to comply with the dictates of the Aguilar decision.

104. The only Board of Education employee who is present in the CAI room while the private school students work on the computers is a non-instructional technician (referred to as a "CAI technician"). These technicians are non-professional employees; their civil service title is school aide. They are not computer programmers or otherwise expert in the use of computers. They do not install or repair the computers; those functions are performed by other non-instructional personnel. The CAI technician's primary duty is to maintain order among the students. They also take attendance, maintain student records and perform elementary functions with the computers, specifically turning them on and off, rebooting them and bringing up the program, if necessary.

105. My Bureau has issued written guidelines for its Chapter 1 personnel. The guidelines applicable to CAI technicians provide that they may not, under any circumstances, instruct the students, or assist them in anything but the operation of the computers. CAI technicians are expressly prohibited by the guidelines from reading to students, defining or spelling words for them, or helping them with mathematical calculations. For example, if a student asks a technician the definition or spelling of a word, the technician may not provide the answer, but may

allow the student to borrow a dictionary. I know of no violations of these provisions of the guidelines. (Exhibit "F" annexed, Administrative Procedures for Non-Instructional Technicians (School Aide) Assigned to Chapter 1 Computer Room, dated October 14, 1988, at p. 3, and attached memo, dated May 27, 1988, from Margaret 0. Weiss to Non-instructional Technicians.)

106. My Bureau has also issued guidelines for Chapter 1 teachers, which require the CAI teachers to maintain communications on a regular basis with the CAI technicians by telephone, at the beginning of the school day. In addition, if there are problems with the operation of the computers, the Chapter 1 teacher learns of this through monitoring the students, computer work product. (These guidelines are attached as Exhibit 29 to plaintiffs' summary judgment papers, p. 2.)

107. There are many electronic and physical safeguards to insure that the CAI computers are not usable for any purpose other than Chapter 1 instruction.

108. There are two types of CAI computers installed in the private schools. Some of the computers are "dumb" terminals that do not have their own central processing units or disk drives. These "dumb" terminals automatically connect themselves to a Board of Education site when they are turned on; thus, their use is subject to electronic monitoring, as described above. A data line connects these "dumb" terminals to the main computer at the Board of Education site; the main computer transmits the Chapter 1 lessons electronically to the terminals in the private schools.

109. The remainder of the CAI computers installed

in the private schools are personal computers that have their own central processing units and floppy disk drives. The floppy disk drives are covered by locked security devices. The Board of Education has sole possession of the keys to the security devices, and the keys are kept at Board of Education offices and not in the CAI rooms or elsewhere in the private schools.

110. Not only is the software used in these CAI computers limited to that installed by the Board or at its direction, but the Board also electronically limits access to these computers to students enrolled in the Chapter 1 program.

111. The Board prohibits students who are not registered for CAI from using the Chapter 1 computers. Private school staff are also prohibited from using the CAI computers at any time. I know of no violations of these prohibitions, and given the electronic safeguards described below, it can be stated with some confidence that there have been no such violations.

112. The Board gives each student enrolled in CAI a password. To access a CAI computer, a student must enter his or her password, which automatically places the student in the program designated for him or her by a Chapter 1 teacher. The computers located in the private schools cannot be activated or used in any other way, except to print a student progress report pursuant to an electronic command transmitted by a Board Chapter 1 teacher located at the Board's office.

113. Only the Board's Chapter 1 personnel have the electronic capability of entering and deleting in the computer systems the names of students who may access the CAI

computers.

114. All but a few of the computers installed in the private schools are located in separate rooms, in which no other activity occurs while Chapter 1 CAI is given ("CAI rooms"). The only persons who may be present in the CAI rooms during CAI sessions are the students and the Board's CAI technician. I know of no violations of this requirement.

115. Almost all CAI rooms are used only for Chapter 1 instruction. Beginning in the 1988-89 school year, three schools in which CAI sessions are held only two or three times a week have been allowed to use the CAI rooms for other purposes on the days when there are no CAI sessions.

116. In a few private schools, the small number of Chapter 1 eligible students warranted the installation of only one computer. Beginning in April 1989, one CAI computer (each a "dumb" terminal type) was installed in some of these schools in a room that the schools may use for other purposes (such as a supply room) at any time. Through the end of school year 1990-91, this arrangement has been used in a total of four private schools. None of those four schools continue to use this arrangement, however, this arrangement has been implemented in two other private schools since 1991.

117. In addition to the CAI computers that are installed in private schools, the Board of Education has acquired and distributed "lap-top" computers for use in the homes of some Chapter 1-eligible private school students. These lap-tops have been electronically "encrypted" so that they are only usable for Chapter 1 instruction.

118. Each lap-top is a PC that has only a floppy disk drive (no hard disk drive). The PC hardware (i.e., "mother board") has been altered so that the disk drive can read only the floppy disks that the Board provides with the computers. These floppy disks are dialing disks; their only capability is to automatically dial a local area network when the computer is turned on, which connects the lap-top to the software company. The Chapter 1 instructional programs are then transmitted to the lap-top. The Chapter 1 teacher at the Board of Education office can electronically monitor the student's work and adjust the lessons appropriately. The process is similar to that used with the CAI computers installed in the private schools.

119. The Board selects all the software which is used in CAI. No software is used which could be diverted for religious purposes, or for any secular purpose other than CAI. For example, to ensure non-divertibility, the Board does not use wordprocessing, graphic or spreadsheet software in CAI.

120. The computer hardware and other equipment used in providing CAI is labeled as property of the Board of Education.

121. There can be no religious symbols in the CAI rooms. During the 1994-95 school year, a CAI technician reported that a crucifix had been placed on a wall of a CAI room. The Board informed personnel of the private school that the crucifix had to be removed. When it was not removed after about five school days, the Board ceased providing CAI to students of that school. The Board resumed CAI services approximately one week later, after verifying that the crucifix had been removed. I know of no other instance where the requirement that there be no

religious symbols in the CAI rooms has been violated.

122. From an educational perspective, as the Chapter 1 achievement tests demonstrate, it is preferable for students to have face-to-face interaction with teachers, rather than to work only on computers. Some but not all private school students who receive CAI also receive some face-to-face instruction from Chapter 1 teachers in public school sites, MIUs, or leased sites.

123. In school year 1986-87, no students received Chapter 1 services through CAI. In subsequent school years, the figures were as follows: in 1987-88, 2,135 students from 22 private schools; in 1988-89, 4,802 students from 78 private schools; in 1989-90, 7,258 students from 111 private schools and in 1990-91, 8,488 students from 138 private schools.

124. As explained above, CAI is not as educationally effective as face-to-face instruction. A combination program, generally using CAI two days per week and face-to-face instruction one day per week, is therefore educationally preferable. The Board has not been able to provide combination services to all students who receive CAI, because of the limited availability of public school sites, leased sites and MIUs, and because face-to-face services were declined for some of the private school students who receive CAI.

125. Combination services were offered beginning in school year 1988-89. The number of students who received combination services are a subset of the number of students, listed above, who received CAI. In school year 1988-89, 1,003 students from 25 private schools received Chapter 1 combination services. In subsequent school years,

the figures were as follows: in 1989-90, 1,546 students from 36 private schools and in 1990-91, 2,356 students from 67 private schools.

126. CAI and combination services have continued to be provided to private school students in the Chapter 1 program. In school year 1993-94, 9,662 students from 149 private schools received CAI. Of these, 2,115 students from 63 private schools received combination services.

Stationary Instructional Units

127. Stationary instructional units ("SIUs") are small structures built to accommodate Chapter 1 classes. Although the Board has not used SIUs as a post-Aguilar delivery method, we did investigate the possibility of using them in our post-Aguilar program. I understand that plaintiffs are asserting that the Board should have used SIUs.

128. There were several concerns about the use of SIUs. The first was a legal concern. At the time this alternative was considered, in 1988, there were serious legal concerns raised by the placing of SIUs on property owned by religiously-affiliated private schools. SED initially stated that this was prohibited because of Aguilar (Exhibit "B" annexed) and DOE stated that this could be done only in limited circumstances (DOE Guidance of June 1986, Exhibit "C" to the Fagan Declaration, pp. 3-6). The Board accordingly planned to use SIUs, if at all, only in a small pilot program, which could serve to test their legality.

129. With great difficulty, the Board was able to locate three sites after extensive canvassing of the private schools to find available land on either private school property or other nearby available land, such as an empty

lot. Vacant land is an extremely scarce commodity in many New York City neighborhoods.

130. We then began investigating the cost of constructing the SIUs. Initially, we anticipated that the cost would be relatively inexpensive, and that we could simply obtain a slightly modified version of the trailers that are used on construction sites. However, it seems that no endeavor of this nature is ever simple or inexpensive in New York City. For example, in addition to all the New York City health and safety code requirements, we learned that we would also have to comply with any design requirements imposed by the Municipal Art Commission, a body created by the New York City Charter, which is empowered to review designs for buildings and other structures erected on land owned or leased by local government. We met with the Commission, which proposed significant design modifications to make the structure more visually appealing. (It should be emphasized that their concern was primarily for the exterior appearance and the visual impression given to anyone who would use the street, rather than for the interior of the structure, which would most affect the students.) The Commission suggested we put a peaked roof on the structure, criticized the visual rhythms created by the fenestration (i.e., the windows), etc.

131. We also determined that obtaining an electricity hook-up would be costly. When all these factors were considered, we estimated that the initial cost for constructing each SIU would be $100,000. (Exhibit "G" annexed hereto, letter to Robert Eshard from Steven Schwager dated May 26, 1987). Further, the likelihood of vandalism in these high-crime areas was a problem that would have to be addressed through additional operating expenditures for security, insurance and maintenance and

repair services. Accordingly, SIUs did not appear to be nearly as cost-effective as originally anticipated.

132. I am informed that plaintiffs assert that we should have placed SIUs on public school property. This would have deprived the public schools of a portion of their schoolyards, which are normally used for recreation and physical education. The number of Chapter 1 students in many private schools would have required several SIUs to accommodate the program. This would have meant the loss of a substantial amount of the very limited open space available to the public school. Based upon information provided by the Board's Division of School Facilities, there is no record that any public school has ever been forced to give up a portion of its schoolyard for the benefit of students from another public school or a private school. Further, it is almost certain that plaintiffs' proposal would have been bitterly opposed by the public schools involved.

133. In addition, plaintiffs' proposal would have necessitated the same loss of instructional time through travel that was described above in relation to public school and leased sites. One of the primary reasons for using SIUs would have been to eliminate travel and the resulting loss of instructional time.

Generally Applicable Provisions of the Chapter 1 Program for Private School Students

Board of Education Personnel

134. The teachers and other personnel who provide Chapter 1 services to private school students in New York City are Board of Education employees. They are hired and assigned by the Board without regard to their religious

affiliation, gender, race, national origin, or whether they speak languages other than English.

135. Approximately 66% of the teachers, 88% of the guidance counselors, and 100% of the psychologists and social workers who are fulltime personnel employed in the Chapter 1 private school program, serve students from more than one school during the course of their workweek. As described in the annexed declaration of Marie DeCanio, at least 60% of the professional staff is of a religious affiliation different than that of one or more of the private school(s) whose students they serve.

136. My Bureau's written guidelines for our employees provide them with instructions for carrying out their duties under the unique circumstances resulting from the Aguilar decision. The instructions are designed to preserve the secular nature of the Chapter 1 program for private school students. The guidelines also provide instructions concerning other matters which arise in light of the itinerant and other unusual conditions in which most of our staff perform their duties. (Copies of the Guidelines for Staff assigned to CAI are at Pls. Exhibit 29; copies of the Guidelines for Staff assigned to MIUs, and the Guidelines for Staff assigned to Neutral Sites, are annexed hereto as Exhibits "H," and "I," respectively.)

137. The public school sites, neutral sites and MIUs may be used for conferences between the Board's personnel and the private school personnel concerning the Chapter 1 program. This is the only purpose for which the private school personnel may use a public school site, neutral site or MIU. These teacher conferences do not normally occur while the private school students are at the Chapter 1 sites.

138. I know of no violation of this restriction. It would be impossible for anyone to establish that this restriction has never been violated, since there are over 300 professional employees assigned to serve private school students at any one time, who work in over 170 different locations. However, based on my experience supervising the Chapter 1 staff, the emphasis we have placed in numerous staff meetings upon strict compliance with restrictions and guidelines because they reflect possible constitutional mandates, the results of unannounced visits by supervisors, and the concern which the staff has repeatedly expressed to comply with the restrictions and guidelines, it is my strong belief that had there been violations of this restriction, I would have learned of them.

139. An example will show the extreme care exercised by the Chapter 1 staff. Our staff may hold conferences with parents of the Chapter 1 students in the MIUs, but may not hold such conferences in the private schools. One of our Chapter 1 teachers made an appointment to hold a workshop with the parents of some Chapter 1 students. The workshop was scheduled to take place in an MIU, but the MIU was delayed because of inclement weather; it was raining heavily. When the parents appeared, rather than briefly taking them into the private school, the teacher took her written material from the trunk of her car, and stood in the street, distributing and explaining the material to the parents in the rain, before rescheduling the workshop.

140. The Board's personnel who provide Chapter 1 services to private school students are prohibited from providing instruction or clinical and counseling services in the private schools, except in certain emergency situations. In such emergencies, involving, for example, the death of a

teacher or another student known to the Chapter 1 students, a Chapter 1 guidance counselor, social worker or psychologist may, with permission from Board supervisors, provide emergency counseling in the private school. I know of no instance where the general prohibition against Board personnel providing services in the private schools has been violated.

141. The Board of Education's collective bargaining agreement with the United Federation of Teachers (the union which represents all teachers, guidance counselors, school social workers and school psychologists employed by the Board), governs announced visits by supervisors for the purpose of formal observations. Pursuant to this contract, every tenured professional employee receives one announced visit by a Board supervisor each year for purposes of a formal observation and evaluation. Every non-tenured professional employee receives three announced visits per year. The same requirements govern professional employees who serve public school students,in the Chapter 1 program and all other programs. In addition, Board supervisors make a number of unannounced visits to the Chapter 1 personnel who serve private school students.

142. The total number of both announced and unannounced supervisory visits to each professional employee is approximately ten per school year. During these visits, which are made to the public school site, neutral site or MIU, the Board supervisors, primary focus is on the effectiveness of the instructional or support services provided and the progress made by students. However, the supervisors also ascertain that the staff is generally complying with Board guidelines and mandates. These include both general requirements governing conduct applicable to all Board staff, and the guidelines and other

requirements designed to preserve the completely secular nature of the Chapter 1 program.

143. Although there have been quite a few instances where staff members have been cautioned and, in a few instances, disciplined, for violations of Board mandates relating to general conduct, such as attendance and punctuality, there has been only 1 instance, in the 9 years of the post-Aguilar program, in which a staff member was found to have violated any Board mandate concerning the secular nature of the program. The incident involved a guidance counselor, and occurred within months after our post-Aguilar program was first implemented. All of our staff had been instructed to remove their belongings from the private schools and to cease working in these buildings. This guidance counselor was using an office in the rectory to write his reports and to store files, but not to counsel students. He counseled the students in an MIU. Apparently, for his own convenience, he did not comply with the directive, and had to be individually ordered to move his belongings out of, and cease using the office in the rectory.

144. I know of no instance of the Board's Chapter 1 staff attempting to indoctrinate students in religious tenets, engaging students in discussions of religious issues, interfering with any student's freedom of religious belief, or in any way intruding into religious matters. Nor do I know of any instance of the Board's Chapter 1 staff interfering with, or becoming involved in, the operations of any private school. Again, based on the factors cited above, it is my strong belief that there have been no such occurrences.

145. Both the Chapter 1 statute and regulations and SED guidelines mandate that the Board's Chapter 1 staff

consult with private school personnel to develop programs that effectively supplement the students' regular classroom instruction.

146. The Board's Chapter 1 staff accordingly consult with the private school staff regarding the private school students, progress and needs. However, it is the Board's staff which determines the content and methodology of the instruction and clinical and guidance services provided through Chapter 1 to the private school students. The private school staff cannot dictate the content of, or methodology used to provide these services.

147. Neither the Board's Chapter 1 personnel nor the employees of the MIU or private bus companies enter private school buildings to escort students to a public school, leased site or MIU. The students are met at a door of the private school.

148. The Board prohibits its Chapter 1 personnel from attending any religious services or events at their students, schools. This prohibition extends to holiday observances, such as Christmas gatherings. I know of no violation of this prohibition.

149. The Board's Chapter 1 personnel receive their paychecks by mail or at Board offices, not at the private schools.

150. With one exception, the Board's Chapter 1 personnel do not monitor or inspect the private schools whose students receive Chapter 1 services. When a CAI program is proposed for a private school, noninstructional personnel from the Board inspect the room where CAI is to be installed, primarily for electrical capacity, to make sure

the room is appropriate for the purpose. At the same time, these Board personnel also check to make sure that the proposed CAI room is free of religious symbols.

Other General Provisions

151. All equipment used by the Board to provide Chapter 1 services to private school students (such as computers, desks, and chairs) is labeled or otherwise marked as property of the Board of Education. The equipment and supplies are inventoried annually.

152. All equipment and supplies remain the property of, and under the control of, the Board. All equipment and supplies are used only for the Chapter 1 program; none is made available to private school personnel.

153. In school year 1990-91, approximately 86% of the private school students in the Chapter 1 program attended Roman Catholic schools and approximately 8% attended Hebrew Day schools. The remaining 6% of the students attended schools that were Greek Orthodox, Lutheran, Episcopal, Ukrainian Orthodox, other denominational, or nondenominational. These figures were not markedly different during the years 1986-87 through 1993-94.

154. As discussed above, Chapter 1 classes are composed of students from the same school. Some private schools have all male or all female students, and the Chapter 1 classes for students from those schools are therefore composed of students of one sex.

155. Also as discussed above, the Board does not assign its staff based on gender, for classes of students from

these single-sex schools or for any other classes. I am informed that plaintiffs attach a copy of our responses to plaintiffs' interrogatory 21 (Pls. Exhibit "8"), and rely on the response to 21(i) for the assertion that the Chapter 1 staff for students of 2 of 4 single-sex private schools were all of the same gender as the students. This was actually the case for only 1 of these 4 single-sex private schools. The subsequent amended and corrected response to this interrogatory, states that the program for Aquinas High School, an all-girl school, had a Chapter 1 staff of both men and women. (Municipal Defendants' 2nd Supplementary Responses to Plaintiffs' First Set of Interrogatories, Response to 21(i), annexed as Exhibit "J"). In the instance where the Chapter 1 personnel were all of the same gender as the students, the staff was small and extremely stable.

The Non-Instructional Costs of Aguilar-Compliance

156. Regulations promulgated by DOE require that an LEA generally take the noninstructional administrative costs of providing Chapter 1 services "off the top" of the LEA's entire Chapter 1 allocation, rather than charging such costs solely to the group of students for whom they were incurred. (34 C.F.R. § 200.52(a)(2).)

157. This off-the-top policy, which was established by DOE prior to the Aguilar decision, applies to the noninstructional administrative costs of delivering Chapter 1 services to all (public and private, including non-sectarian, school) participating students.

158. Following the Aguilar decision, DOE stated, in its August 1985 written guidance, that the "off-the-top" policy should also be applied to the noninstructional costs of complying with Aguilar. (Exhibit B to the Fagan

Declaration, p. 6, question 15.) This directive was later promulgated as a regulation. (34 C.F.R. 200.52(a)(2).)

159. After Aguilar, the State of New York allocated funds to cover part of the noninstructional costs incurred by LEAs in response to Aguilar. Annual allocation of these funds began in the 1986-1987 school year, and continued through the 1990-1991 school year.

160. In 1988, the Chapter 1 statute was amended by enactment of 20 U.S.C. § 2727(d), which authorizes appropriations for "capital expenses" incurred by LEAs throughout the nation in providing equitable Chapter 1 services to private school students. Capital expenses are expenditures for noninstructional goods and services required to comply with Aguilar. (34 C.F.R. § 200.57(a)(2).)

161. The Board of Education's receipt of state funds under Chapter 53, and federal capital expense funds under section 2727(d), while not sufficient to cover all Aguilar costs, has allowed the Board to avoid taking most of its noninstructional costs of complying with Aguilar off the top of its total Chapter 1 allocation. This means that more funds have been available for instructional and support services for both public and private, (including non-sectarian) school students.

162. In some years, the Board has not had to take any of its Aguilar-related costs off the top, because of these two funding sources and "carryover" funds. Carryover funds are unspent funds from prior years; the carryover funds here were all originally allocated for private school students. These funds accrued during the early years of the post-Aguilar period, because the number of participating private school students decreased dramatically during those

years.

163. During 1986-87, the total expenditure for the Chapter 1 program in New York City, for both public and private (including non-sectarian) school students was $190,146,061. Of this sum, $7,506,800 were State funds provided pursuant to Chapter 53.

164. During 1986-87, the Board of Education took $169,701 off the top of its Chapter 1 allocation to pay noninstructional administrative costs of delivering Chapter 1 services to private school students in compliance with Aguilar. If these off-the-top Aguilar compliance costs had instead been charged only to students attending private (including non-sectarian) schools, the Board's allocation for each eligible public school student would have increased by $0.69 and for each eligible private (including nonsectarian) school student would have decreased by $4.52.

165. During 1987-88, the total expenditure for the Chapter 1 program in New York City, for both public and private school students was $197,657,498. Of this sum, $7,484,000 were State funds provided under Chapter 53.

166. During 1987-88, the Board of Education took $954,867 off the top of its Chapter 1 allocation to pay Aguilar-compliance costs. If these off the top costs had instead been charged only to students attending private schools, the allocation for each eligible public school student would have increased by $4.09 and for each eligible private school student would have decreased by $30.46.

167. During 1988-89, the total expenditure for the Chapter 1 program in New York City, for both public and private school students was $257,512,021. Of this sum,

$8,600,000 were State funds provided under Chapter 53.

168. During 1988-89, the Board of Education took $ 297,221 off 1993-94 these identifiable transportation costs were $16,188.

[paragraphs missing]

MIUs

172. During the school years 1986-87 through 1993-94, the Board of Education paid an annual rental of $106,934 per MIU, which covered the use of each MIU for a 6 hour and 20 minute school day, and included the costs of the driver, garage, insurance, maintenance, and repairs. The Board has the option of using one or more of the MIUs for an additional two hours per day at a cost of $75 per hour for each MIU, and has exercised this option for a varying number of MIUs over the years.

173. In 1986-87, the Board spent $7,149,333 for the leasing and associated administrative costs of MIUs. The entire amount was covered by funds provided under Chapter 53.

174. In 1987-88, the Board spent $7,335,877 for the leasing and associated administrative costs of MIUs. For this expenditure, the Board took $208,258 off the top of its total Chapter 1 allocation, and the remainder from funds provided under Chapter 53.

175. In 1988-89, the Board spent $7,594,249 for the leasing and associated administrative costs of MIUs. The entire amount was covered by funds provided under Chapter 53.

176. In 1989-90, the Board spent $9,157,444 for the leasing and associated administrative costs of MIUs. A portion of this amount ($7,671,651) was covered by funds provided under Chapter 53, and the remainder was covered by funds provided under section 2727(d).

177. In 1990-91, the Board of Education spent $11,126,541 for the leasing and associated administrative costs of MIUs. A portion of this amount ($7,372,263) was covered by funds provided under Chapter 53, another portion ($2,799,887) was covered by funds provided under section 2727(d), and the remainder was covered by carryover funds.

178. In 1993-94, the Board of Education spent $13,809,245 for the leasing and associated administrative costs of MIUs. For this expenditure, the Board took $$782,912 off the top of its total Chapter 1 allocation, a portion of this amount ($9,067,333) from funds provided under section 2727(d)) and the remainder from carryover funds.

Leased Sites

179. In 1986-87, the Board spent $135,532 for leased sites, including associated administrative costs. The Board took the entire amount off the top of its total Chapter 1 allocation.

180. In 1987-88, the Board spent $387,963 for leased sites, including associated administrative costs. The Board took the entire amount off the top of its total Chapter 1 allocation.

181. In 1988-89, the Board spent $279,082 for leased sites including associated administrative costs. The

Board took the entire amount off the top of its total Chapter 1 allocation.

182. In 1989-90, the Board spent $198,508 for leased sites including associated administrative costs. The entire amount was covered by funds provided under section 2727(d).

183. In 1990-91, the Board of Education spent $280,402 for leased sites including associated administrative costs. The entire amount was covered by funds provided under section 2727(d).

184. In 1993-94, the Board of Education spent $87,670 for leased sites. There were no associated administrative costs for leased sites in this year. The entire amount was covered by funds provided under section 2727(d).

CAI

185. Under regulations promulgated by DOE, expenditures for computers used for CAI (as well as expenditures for CAI technicians) are considered instructional expenditures and are therefore charged entirely to funds allocated for private school students. (34 C.F.R. § 200.57(a)(2)(ii.) These expenditures are not paid for by funds provided under Chapter 53 or section 2727(d), since those funds are reserved for noninstructional-administrative expenditures. Similarly, these expenditures are not taken off the top of the entire Chapter 1 allocation, since that procedure is also reserved for noninstructional administrative expenditures.

186. There are, however, some noninstructional

administrative expenditures for CAI. These are for central office expenses, such as the salaries of central office personnel who worked with CAI.

187. In 1987-88, the Board spent $88,731 for the administrative costs of providing CAI. The Board took the entire amount off the top of its total Chapter 1 allocation.

188. In 1988-89, the Board spent $273,032 for the administrative costs of providing CAI. The entire amount was covered by funds provided under Chapter 53.

189. In 1989-90, the Board spent $348,942 for the administrative costs of providing CAI. The entire amount was covered by funds provided under Chapter 53.

190. In 1990-91, the Board spent $225,711 for the administrative costs of providing CAI. The entire amount was covered by funds provided under Chapter 53. (The higher figure of $240,382, which is provided in Municipal Defendants' Responses to Plaintiffs, First Set of Interrogatories, Response 8(g)(i), (Pls. Exhibit 36), represents the actual $225,711 expenditure plus the 6.5% general administrative cost, which is discussed below.)

191. In 1993-94, the Board of Education spent $245,348 for the administrative costs of providing CAI. The Board took the entire amount off the top of its total Chapter 1 allocation.

Regular Noninstructional Administrative Costs

192. There are, of course, also general noninstructional administrative expenditures for operating the Chapter 1 program in New York City for both public and

private school students. These expenditures have nothing to do with Aguilar compliance; they are simply the usual expenditures for administrative overhead, such as central office expenses.

193. In accordance with the terminology and practice adopted by SED, which audits, monitors and supervises the Board of Education's Chapter 1 program, the Board uses the term "indirect costs" to refer to the general administrative overhead costs.

194. A ceiling for indirect costs, expressed as a percentage of total expenditures (excluding purchases of equipment) is established annually by SED. (SED prohibits any assessment of indirect costs against purchases of equipment.)

195. The indirect cost rate for the Board of Education during the years 1986-87 through 1993-94 was 6.5% for federal Chapter 1 funds. For recordkeeping purposes, the Board computes the indirect costs by adding a uniform 6.5% administrative charge to each component of its federal Chapter 1 budget, except purchases of equipment.

196. The indirect cost procedure is effectively the same as deducting general administrative expenditures before breaking the budget into its various components, and implements the federal regulatory command that the noninstructional administrative costs of serving both public and private school students be charged to an LEA's total Chapter 1 funds. (34 C.F.R. § 200.52(a)(2).

197. The figures given above showing the amount spent on various items (e.g., MIUs, leased sites, etc.), are the actual expenditures for the items; they do not include the

6.5% indirect cost.

198. During school year 1986-87, the Board spent $11,137,275 of its entire Chapter 1 allocation for these general administrative costs of serving both public and private school students under Chapter 1. In subsequent school years, the following amounts were expended for this purpose: in 1987-88 -- $11,890,198; in 1988-89 $15,112,098; in 1989-90 $18,864,579 and in 1990-91 $20,910,171.

199. In 1993-94, the Board spent $24,353,056 of its entire Chapter 1 allocation for these general administrative costs.

Dated: Brooklyn, New York
June 9, 1995

[Margaret O. Weiss]
MARGARET O. WEISS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, FLORENCE FLAST, HELEN HENKIN, HAZEL SMITH, DENISE KROUSER and CHRISTINA WALKER,

Plaintiffs,

-against-

88 Civ. 96 (JG)

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, and CHANCELLOR and BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants,

-and-

RACHEL AGOSTINI, *et al.* and LEAH SAYS, *et al.*,

Defendant-Intervenors.

AFFIDAVIT OF REVEREND VINCENT D. BREEN

Reverend Vincent D. Breen, being duly sworn, proposes and says:

1. I am the Vicar for Education of the Roman Catholic Diocese of Brooklyn. I have served as Vicar or as Superintendent of Education since June, 1978. My administrative responsibilities include overall supervision of the elementary and secondary parochial schools in the counties of Queens and Kings.

2. I make this affidavit with the understanding that it will be submitted to the Court in connection with the cross-motions for summary judgment in this case.

3. On March 22, 1979, I executed an affidavit that was submitted to the United States District Court for the Southern District of New York in National Coalition for Public Education and Religious Liberty, et al. v. Califano (76 Civ 888). I understand that that affidavit was subsequently made part of the record in this Court in Felton v. Califano (Docket No. 78C 1750) -- the case that was subsequently decided by the United States Supreme Court under the name Aguilar v. Felton, 473 U.S. 402 (1985). A copy of that affidavit is attached hereto as Exhibit A.

4. Some of the statistical information contained in my 1979 affidavit is no longer current. Today there are 161 Catholic elementary schools and 22 Catholic secondary schools serving approximately 74,000 students in the two counties that constitute the Diocese. A total of 10,152 students from 97 of these schools received services under Chapter 1 during the 1993-94 school year. Those 97 schools have a total student population of approximately 31,000, of whom 19 percent are non-Catholic. The non-Catholic student enrollment in eight of those 97 schools is more than 50 percent. We do not have records that would show the percentage of those who receive Chapter 1 services who are non-Catholic, but there is no reason to believe that percentage is materially different from the non-Catholic population in the schools those students attend.

5. With the exception of statistics that are out-of-date, the information contained in my 1979 affidavit remains true today. In that affidavit, I described the Catholic schools whose students receive Chapter 1 [then Title I] services and

compared those schools to the "profile" of church-related elementary and secondary schools that has been described by the Supreme Court in certain of its decisions. My description of these schools and comparison of them to the "profile" remains accurate today.

6. I understand that the plaintiffs in this case have maintained that the "purpose and effect" of the current Chapter 1 program in New York "is to keep alive religious schools in this City by subsidizing a substantial portion of their general education program." See Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment ("Pl. Mem.11), at 58. This statement is completely inaccurate insofar as the Catholic schools in the Diocese of Brooklyn are concerned. Chapter 1 funds are not given to the schools themselves, but are received by the New York City Board of Education and disbursed for the benefit of economically and educationally deprived school children. Those funds do not, directly or indirectly, subsidize any portion of the general educational program of the schools of the Diocese. The services that are provided to students under Chapter 1 are supplemental to the general educational services provided by the Catholic schools in the Diocese of Brooklyn, and they are provided only to educationally disadvantaged students, not to the general population of students. They have not replaced any educational services that were previously offered by the Catholic schools in the Diocese of Brooklyn. As noted in my prior affidavit (at ¶ 6), the Catholic elementary and secondary schools in the Diocese of Brooklyn did not provide the types of remedial educational services available under Chapter 1 and its predecessor, Title I, prior to the commencement of the Title I program in New York in 1966. If these services were to become unavailable under the Chapter 1 program -- or if additional restrictions were to be

imposed that made it more difficult for students to receive those services -- the consequence would be that students would go without these important remedial services. The Catholic schools in the Diocese would not have the financial resources to provide the same services. The unavailability of those services would obviously impair the academic progress of some of the students in our schools, but it would not cause financial harm to the schools themselves.

7. It is simply inaccurate to say, as plaintiffs do, that but for Chapter 1 the vast majority of religious schools in this City "might not exist today" and that without an increase in Chapter 1 "they are not likely to continue to exist, at least as schools with a general educational program." Pl. Mem. 31. As noted above, Chapter 1 is not part of the general educational program of the Catholic schools in the Diocese, and the existence of those schools does not depend upon the maintenance of Chapter 1, much less an increase in Chapter 1 funding. The Catholic Schools in the Diocese are under financial pressures, as are all schools, but those pressures are not relieved by Chapter 1 funding, which does not flow to the schools and does not relieve the schools even indirectly of any financial burden that they would otherwise bear. Our schools are financially sound and are not in any danger of collapse. They enjoy the support of their local parishes and communities and of the many parents who find them to provide a safe, effective and supportive learning environment for their children.

[Vincent D. Breen]
Vincent D. Breen

Subscribed and sworn to before
me this 30 day of May, 1995.

Notary Public

My Commission Expires:

FLORENCE C. FLYNN
Notary Public State of New York
No. 01FL8341600
Qualified in Kings County
Commission Expires July 31, 19__

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al.,

Plaintiffs,

V.

JOSEPH A. CALIFANO, Secretary of the United States Department of Health, Education and Welfare, et al.,

Defendants,

and

JAMES and BESSIE BOVIS, et al.,

Intervenor-Defendants,

and

PHILIP and IDA FENSTER, et al.,

Intervenor-Defendants.

76 Civ. 888 (CHT)

AFFIDAVIT OF REVEREND VINCENT D. BREEN

STATE OF NEW YORK)
) ss:
COUNTY OF KINGS)

REVEREND VINCENT D. BREEN, being duly sworn, deposes and says:

1. I am the Superintendent of Education of the Roman Catholic Diocese of Brooklyn. My administrative responsibilities include overall supervision of the education of approximately 125,000 students in the elementary and secondary parochial schools in the Counties of Queens and Kings.

2. I make this affidavit an behalf of the several defendants in this matter, with the understanding that it will be submitted to the Court as part of the joint exhibits to be filed by the several defendants.

3. I have been Superintendent of Education for the Diocese of Brooklyn since June 1978. For two years prior to my appointment as Superintendent of Education, my title was Superintendent of Schools for the Diocese. Prior to that time, I served as Associate Superintendent of Schools from September 1, 1973, to June 30, 1976, and as Assistant Superintendent of Schools from October 1, 1966, to August 31, 1973.

4. In my position as Superintendent of Education for the Diocese of Brooklyn, I have become familiar with the operation of the Catholic elementary and secondary schools within the Diocese. There are 178 Catholic elementary schools and 24 Catholic secondary schools in the two counties that constitute the Diocese. The public schools in those two counties are under the jurisdiction of the New York City Board of Education.

5. In my position as Superintendent of Education for the Diocese of Brooklyn, I have become familiar with the

program of remedial education made available through the New York City Board of Education to economically and educationally disadvantaged children who attend nonpublic schools in Kings and Queens Counties under Title I of the Elementary and Secondary Education Act of 1965 (Pub. L. No. 99-10) (hereinafter "Title I"). According to information supplied by the New York City Board of Education, 12,913 students in 79 Catholic elementary and secondary schools in Kings and Queens Counties were eligible during the 1977-1978 school year, on the basis of economic and educational deprivation, to receive Title I services. Of the total eligible students, 7,726 actually received Title I remedial educational services during that school year.

6. Prior to the commencement of Title I remedial services for nonpublic school students in New York City in 1966, the Catholic elementary and secondary schools in the Diocese of Brooklyn did not have the financial resources to provide to economically and educationally disadvantaged students any of the types of remedial educational services presently available under Title I. If, for any reason, those Title I remedial educational services were no longer available to qualified students in the Catholic elementary and secondary schools in the Diocese of Brooklyn, the schools themselves would not have the economic resources to provide the services on their own.

7. I have reviewed several decisions of the United States Supreme Court deciding the constitutionality of public aid programs benefiting church-related elementary and secondary schools and the descriptions of those schools contained in those opinions. In particular, I have examined the decisions in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), and Levitt v. Committee for Public Education, 413 U.S. 472 (1973), which invalidated programs

of aid to church-related schools and their students enacted by the New York Legislature. Each of those decisions contained what the Court identified as a "profile" of church-related elementary and secondary schools in New York State. Based on my review of those decisions and my knowledge of the Catholic elementary and secondary schools in the Diocese of Brooklyn, I can state that the "profile" of the church-related elementary and secondary schools recited in those opinions does not accurately describe the Catholic elementary and secondary schools under my supervision which have Title I programs under the auspices of the New York City Board of Education.

General Observations

8. The Catholic elementary and secondary schools under my jurisdiction seek to provide above all, a sound education to their students so that those students can become useful, productive and concerned citizens. While the public schools have a comparable central objective, our schools are distinctive from the public schools in that we insist that instruction in religion be a part of the regular school day and that we consciously and explicitly address questions of morals and values when those questions are relevant to the subject matter being taught.

9. A concern for religion and religious values has always been central to the Catholic philosophy of education. However, Catholic educators recognize that such a concern is not their exclusive province. Much of what is taught to students in the elementary and secondary grades, wherever they attend school, is value-laden, and no conscientious teacher should ignore the value implications of secular subject matter. So, in social studies programs in the public schools in New York City the question of the horrors of the

Holocaust is considered and involves both teachers and students in coming to a value judgment about the Nazi treatment of the Jews during World War II. When the question of slavery is taught in history classes concerned with the Civil War, students must also examine similar value questions about the treatment of Blacks in their own country. While religious instruction is given in all Catholic elementary and secondary schools which emphasizes the teachings of Roman Catholicism, the religious and moral values that are addressed in other subjects, particularly in those schools with a significant non-Catholic student population, are not simply Catholic but include more broadly Christian values in recognition of the Judeo-Christian heritage of this nation.

10. The concern for religion and religious values which is central to the philosophy of Catholic schools does not, however, dilute or distort the content of what would be considered secular, as opposed to religious, education courses. Indeed, a document issued in 1977 by the Vatican's Sacred Congregation for Catholic Education admonished Catholic educators as follows:

> "Individual subjects must be taught according to their own particular methods. It would be wrong to consider subjects as mere adjuncts to faith or as a useful means of teaching apologetics. They enable the pupil to assimilate skills, knowledge, intellectual methods and moral and social attitudes, all of which help to develop his personality and lead him to take his place as an active member of the community of man." The Catholic School, § 39 (a document issued by the Sacred Congregation for Catholic Education, March 19, 1977).

The Catholic schools under my supervision have consistently adhered to that proposition -- namely, that secular subject matter has its own integrity and must be taught without distortion or intrusion of religious concerns not relevant to the subject matter.

11. There are two fundamental reasons why Catholic elementary and secondary schools under my supervision offer a separable secular education, along with the religious instruction that is provided.

a. We are obligated under the provisions of the New York State Education Law to offer a curriculum which includes at least the following courses: mathematics, reading, writing, English language, geography, United States history, civics, health education, physical education, New York State history, science and safety education. We are also obligated to provide our students in those courses with a body of knowledge comparable to that provided the students in the public schools in the state so that our students, when they leave school, are prepared to enter into the society with skills and knowledge comparable with other members of society.

b. Even in the absence of those obligations imposed by state law, however, our schools would still provide a curriculum of the type described. We would be failing in our obligation as educators if we did not provide our students with the education necessary for them to be responsible and useful citizens.

12. Against this background of the general

educational philosophy of the Catholic elementary and secondary schools under my supervision, it is appropriate to address more specifically the nature of our Catholic schools, particularly Catholic schools whose students participate in the Title I program.

The Mission of Catholic Schools

13. It cannot be denied that any enterprise undertaken by the Roman Catholic Church is religiously motivated. Thus, the operation of elementary and secondary schools by parishes is consistent with the religious mission of the Roman Catholic Church. However, that religious mission of the Roman Catholic Church is very broad in its scope. Our schools are aware that Jesus told his followers to teach all nations. Our schools have interpreted that command to mean that education -- both religious and secular -- is important to mankind, and they are seeking to fulfill that need. However, we also know that Jesus told us to "feed the hungry, give drink to the thirsty, clothe the naked." Thus the Roman Catholic Church offers services to those who are afflicted, assists those who are in need and comforts those who are unhappy, whatever their race or creed. The religious mission of the Catholic Church, therefore, includes both educational and social concerns.

14. The essential fact about Catholic elementary and secondary schools is that they are community-based -- that is, the overwhelming number of those schools are sponsored by a parish which is located in a particular community with geographical boundaries and which draws its students from the members of the community residing within those geographical boundaries. Those schools of necessity, therefore, reflect the ethnic, cultural, economic and religious profile of the community in which they exist.

These factors can and do affect the educational philosophy and practice of each school. And, while general policies and goals are set forth at the Diocesan level, covering such diverse matters as health and safety regulations and curriculum content, how those policies and goals will be implemented by each school depends on the needs and skills of its population. The religious mission of each Catholic parish is to meet the needs of its parishioners -- both educational and social -- as they are reflected in the needs and circumstances of the local population.

15. The eligibility requirements for student participation in Title I remedial education programs are such that those programs will be found only in those Catholic elementary and secondary schools that are in that portion of the metropolitan area which we have come to call the "inner city." To understand the mission of Catholic elementary and secondary schools whose students receive Title I services, it is essential to define the community that is being served and the mission which those parishes fulfill in operating schools in those communities.

16. Because they are located in inner-city communities, the Title I schools in Kings and Queens draw their students from a highly concentrated minority population. When those schools are located in such areas as Bedford-Stuyvesant, the population from which the students are drawn is overwhelmingly Black. It is a fact that a small minority of the American Black community is Roman Catholic. Consequently, Catholics constitute a minority of the total population of Bedford-Stuyvesant. Nevertheless, Catholic parishes in Bedford-Stuyvesant continue to operate elementary schools and, as a consequence now serve a student population that is approximately 40 percent non-Catholic.

17. While the responsibility for financing the operation of elementary schools rests with the parish or parishes sponsoring those schools, the Diocese of Brooklyn has found it necessary over the past 13 years to provide an additional Diocesan subsidy to inner-city schools with significant non-Catholic student bodies to keep them in operation. This subsidy is necessary because the parishes do not have sufficient funds to provide a full subsidy for the operation of their schools. Over the past 13 years, the Diocese of Brooklyn has contributed, in addition to the subsidies of each individual parish, a Diocesan subsidy amounting to almost $11 million. Virtually all of the money has been used to defray deficits incurred by schools with Title I programs. In Bedford-Stuyvesant alone, where a significant number of non-Catholic youngsters are attending our schools, the Diocesan contribution to the operation of those schools has been over $2 million.

18. It is evident that the religious mission which both parishes and the Diocese are fulfilling in the operation of these schools and for which the Diocese and parishes are expending such large sums of money relates to the educational, as well as the social, mission of the Catholic Church. Those parishes, with the support of the Diocese, have chosen to offer to the students of the inner city a value-laden educational program of high quality. The services are offered despite the fact that the number of Catholic students is not sufficient to fill these schools. Thus, the religious mission of the parishes in sponsoring those schools is a reflection of the educational and social needs of those communities and the educational and social concerns of the Roman Catholic Church.

19. One of the characteristics of the "profile" of the parochial schools discussed by the Supreme Court in its

decisions in Committee for Public Education v. Nyquist, supra, and Levitt v. Committee for Public Education, supra, is that those schools were "an integral part of the religious mission of the church sponsoring" them. If that element of the "profile" was intended to address the motivation of the Diocese of Brooklyn in maintaining schools with Title I programs that serve a significant non-Catholic student population, I have no quarrel with applying that description to the schools under my supervision with Title I programs. However, if that element of the "profile" is meant to suggest that those schools exist solely for narrow parochial or sectarian purposes, I would take issue with such a characterization of the schools under my supervision which have Title I programs on their premises. As I have just explained, the mission of the parishes sponsoring community-oriented schools with Title I programs is as much educational and social as it is religious.

Admissions Practices

20. Since meeting the needs of the communities in which they are located is an important element in the operation of our Catholic inner-city elementary schools and secondary schools, the admissions policies for these schools reflects that factor.

21. Because all of the schools under my supervision are supported, at least -- in part, by revenues of the parishes which sponsor them, preference in admission is given to children of those persons who provide the revenue to the parish -- namely, parishioners who contribute regularly to the parish. Because of that policy, first preference for available places in the schools under my supervision would be given to the children of parishioners.

22. However, once the needs of children of parishioners are met, remaining spaces at the school are open without consideration to the religious affiliation of the student or of his parents. Thus, the remaining seats are available to members of the community and reflect, therefore, the ethnic, cultural, economic and religious profile of that community.

23. The information regularly supplied to my office by individual schools does not show the religious composition of their student bodies. However, a special survey conducted at the request of counsel and completed in June 1976 collected such data for the 75 elementary and secondary schools in the Brooklyn Diocese that had Title I programs on their premises. I have no reason to believe that the figures revealed by the survey have changed significantly since the survey was conducted. The survey showed that the 75 schools had a total student population of 39,194. Of that enrollment, 2,889 students, or 7.4 percent of the total, were non-Catholic. The four schools of the Brooklyn Diocese with Title I programs that are located in Bedford-Stuyvesant and East New York, where there are large Black populations, had non-Catholic student enrollments of 41, 43, 48 and 58 percent, respectively. The enrollment in those schools, therefore, reflects to a significant degree the racial and religious composition of communities in which they are located. Similarly, one-third of the total enrollment in the four schools of the Brooklyn Diocese in South Jamaica and Springfield Gardens is non-Catholic. Again, those communities have a large Black population, and the number of non-Catholics in the four schools reflects the composition of those communities.

24. The preference for Catholic students in the admissions process is a natural consequence of our desire to

see that children of those who support the parish which supports the school should have free access to these schools. However, those schools are strongly community-oriented and admit students from all segments of the community after the needs of parishioners have been satisfied. Whenever the community in which the school is located has a significant non-Catholic population, as is the case with many of the schools of the Brooklyn Diocese with Title I programs on their premises, the consequence of the admissions policies of those schools is to admit significant numbers of non-Catholics to be educated in those schools.

25. Another element of the "profile" of the parochial schools described in the Nyquist and Levitt decisions was that those schools "impose religious restrictions on admissions." As is evident from the statistics that I have referred to, the schools in the Brooklyn Diocese with Title I programs on their premises generally do not, as a matter of policy and practice, restrict admissions an religious grounds.

Curriculum

26. The curriculum offered in the elementary and secondary schools of the Brooklyn Diocese contains all of the secular courses prescribed by New York State law and also includes courses in religious instruction. In all courses offered in those schools, questions of religious and moral values are examined when they are relevant to the subject matter being taught. It is the inclusion of religious instruction as part of the regular curriculum and the value-oriented nature of that curriculum which, in my opinion, makes Catholic schools distinctive.

27. There are no religious restrictions on the

secular content of the secular subjects offered in the elementary and secondary schools of the Brooklyn Diocese. Those responsible for the education offered in those secular courses are committed to the search for truth, and are not restricted in that search by any religious restraints. The secular content of the secular courses has its own academic integrity, and it would be a gross distortion of the educational process of our schools to restrict the secular content of those courses because of the religious beliefs of the Roman Catholic Church. Thus, our schools do not "impose religious restrictions on what or how the faculty may teach," as the Supreme Court assumed the parochial schools described in the "profile" in the Nyquist and Levitt decisions did.

28. It is true, of course, that there is not always a sharp line dividing the secular from the religious in the educational process. In the study of history, for example, a large part of the story of the development of western civilization is the story of the impact of Christianity on that civilization. Of necessity, therefore, the course in Western Civilization will touch upon the history of Christianity and upon the conflicts that have divided Christianity into various denominations and sects. The history teacher's objective and role in our schools is to present an objective account from the point of view of the discipline of history of those conflicts. If that objective account of the conflicts is inconsistent with an account offered by Roman Catholic theologians, any reconciliation of those inconsistencies, if there is to be a reconciliation, should be made by the theologian and not the history teacher, for it is the theologian who is most academically qualified to explain the points of difference on questions of faith and morals among the various Christian denominations.

29. Some of the secular subjects taught in the elementary and secondary schools in the Brooklyn Diocese, of necessity, touch upon questions of morals and values. While teachers are not restricted on how they treat those matters of morals and values, they are encouraged to address directly such matters and not shun them.

30. The teachers in the elementary and secondary schools of the Brooklyn Diocese do not engage in any effort to inculcate students in specific religious or moral values. The concept of "inculcation" is simply inconsistent with the educational process. That concept suggests, both in its connotations and literal definition, an effort to induce students to accept ideas or values through coercion. The schools under my supervision do not engage in that activity, whether religious values or other aspects of learning are involved. Thus, the schools under my supervision do not have "as a substantial purpose the inculcation of religious values," a characteristic attributed to the parochial schools in the Nyquist and Levitt decisions when the Supreme Court described the "profile" of those schools.

31. While our schools do not seek to "inculcate" religious values, they do make a conscious effort to make students aware of such values so that they will be better citizens. Many of the values that are addressed are expressed in the teachings of the Roman Catholic Church. However, many of those values -- such as justice, respect for the dignity of other persons and racial tolerance -- are also shared by other religious denominations and our society in general. The purpose of examining those values in all aspects of the curriculum where they are relevant is to bring students to an understanding of those values and, if they freely choose, a commitment to those values. Such an objective in no way differs from the efforts of the public

schools to bring their students to a free commitment to such values as patriotism, honesty and truth in their dealings with others. The study of the horrors of the Holocaust in the social studies program of the New York City public schools is specifically intended to show students that religious and racial intolerance is an evil to be abhorred. It is also intended to encourage the students to commit themselves to the values of tolerance, justice and concern for others in society. The explicit value orientation of the curricula in the schools of the Brooklyn Diocese has a similar objective.

32. I should also note that the values that are addressed in the curricula of the schools of the Brooklyn Diocese are not exclusively or narrowly religious in nature. For example, because those schools, including the schools with Title I programs, reflect the needs and aspirations of the communities in which they are located, the elementary and secondary schools of the Brooklyn Diocese which are located in communities with large ethnic populations will orient their curricula to take account of the ethnic concerns of the communities. Thus, a Diocesan school located in a predominantly Black community gives special attention to topics such as Black studies and Black history. Dealing with those ethnic concerns is as much a statement of values as including courses in religious instruction in the curriculum.

33. As I have previously mentioned, religious education is a regular part of the curriculum in the schools under my supervision. Parents who enroll their children in those schools, whether those parents are Catholics or members of some other religious faith, are told prior to enrollment that their children must participate in the entire curriculum of the schools, including that portion of the school day devoted to religious instruction.

34. In the Nyquist and Levitt decisions, the Supreme Court included as one element of the "profile" of parochial schools that they required students to "attend instruction in the theology and doctrine of a particular faith." While all students in the schools under my supervision are required to attend religious instruction, the content of that instruction is not as narrow or as limited as the Supreme Court suggested in those two decisions.

35. The focus of religious instruction offered in the schools of the Brooklyn Diocese is on the teachings of Christianity as the Roman Catholic Church understands those teachings. In the course of that instruction, teachings and beliefs that are peculiar to the Roman Catholic Church are examined and explained. Those who teach religious education classes are required to have a thorough understanding of those teachings and beliefs and are required to teach them accurately, not representing as Catholic doctrine something which is not.

36. However, the religious instruction offered in the schools of the Brooklyn Diocese is not limited or restricted to Catholic teaching or doctrine. The Roman Catholic Church is part of a broader Christian community, and many of its teachings and beliefs are shared by other religious denominations. Of necessity, therefore, much of what is taught in religious instruction is not narrowly sectarian in content. Moreover, our schools are conscious of the mandate from the Second Vatican Council to have respect for other Christian communities and to "joyfully acknowledge and esteem the truly Christian endowments from our common heritage" with other Christian churches. In the spirit of that mandate, the religious instruction offered in the schools in the Brooklyn Diocese, and particularly those schools with Title I programs and non-Catholics in the

student body, shows respect and sensitivity for the religious beliefs of all students, whatever those beliefs may be.

37. No effort is made in the religious instruction offered by the schools of the Brooklyn Diocese to compel any student, whether he is Catholic or of some other religious faith, to accept as valid or adhere to the teachings of the Roman Catholic Church. Indeed, any effort to do so would be in direct conflict with Roman Catholic teachings, One of those teachings is that faith is considered to be a gift of God to which each person must respond freely or not at all. It would be contrary to those teachings to attempt to compel any student to adhere to particular religious beliefs or to accept a faith to which he cannot freely subscribe. Thus, the schools under my supervision do not "require obedience by students to the doctrines and dogmas" of the Roman Catholic Church, as the Supreme Court suggested the parochial schools did in the Nyquist and Levitt cases.

38. Parents of children who subscribe to a religious faith other than the Roman Catholic faith enroll their children in the schools of the Brooklyn Diocese for a variety of reasons. One-of their motivations is that they themselves are strongly religious people -- whether they be Baptists or Muslims or Buddhists -- and they wish their children to be exposed to religious values as a part of their education. But they enroll their children in Catholic elementary and secondary schools at considerable expense to themselves, and their primary objective is to obtain a sound education for their children. The schools of the Brooklyn Diocese would be defeating the expectations of those parents if they used the religious instruction or any other parts of the curriculum for purposes of proselytization or to compel the students to accept beliefs that they cannot in good conscience accept. Those schools would also be contradicting the

ecumenical teachings of the Second Vatican Council and denigrating the social mission of the Catholic Church in maintaining the schools in the inner city that are attended by a significant number of non-Catholics.

Religious Activities

39. Most of the elementary and secondary schools of the Brooklyn Diocese include some form of religious observance as part of the school day. Most typically, that religious observance would be in the form of a prayer recited at the beginning or end of the school day, or before instruction begins in a particular class. In addition, many schools will schedule on an occasional basis and during regular school hours more formal liturgical observances. All students enrolled in those schools are expected to be present during those religious observances, but the degree or extent to which they participate is a matter of their own consciences. There are, however, some religious activities in the schools, such as the reception of the Sacraments, in which non-Catholic students are not permitted to participate.

40. One of the characteristics of the parochial schools described in the Nyquist and Levitt decisions was that they required "attendance of pupils at religious activities." The schools in the Brooklyn Diocese engage in that activity to the extent that I have described.

41. Parents of students who subscribe to a religious faith other than the Roman Catholic faith are told prior to registering their children that the children will be expected to be present for the type of religious observances that I have described. To my knowledge, no parent of a student who is of a religious faith other than the Roman Catholic faith has complained that his child's participation in

those religious observances has in any way compromised the student's own religious beliefs or practices.

Conclusion

42. I have attempted in this affidavit to provide an accurate portrayal of the policies and practices of the elementary and secondary schools of the Brooklyn Diocese. I am aware that my description of the policies and practices of those schools is at odds with the description of parochial schools in the Nyquist and Levitt decisions and with many popular stereotypes of Catholic parochial schools. However, those stereotypes reflect a profound misconception of the purposes and educational programs of the schools under my supervision.

43. Those stereotypes seek to portray Catholic parochial schools as having a singular and overriding objective of indoctrinating students in the Roman Catholic faith or of compelling them to subscribe to the beliefs of the Roman Catholic Church. While the schools of the Brooklyn Diocese do serve religious functions and do have religious objectives, they do not have the extreme characteristics that the stereotypes attribute to them.

44. The basic objective of the elementary and secondary schools in the Brooklyn Diocese, including those with Title I programs, is to provide their students with a sound education in an environment in which they are exposed to religious education and religious and moral values. Our goal is to produce students who have the knowledge and intellectual skills to be useful and productive members of their communities and who are also aware of the religious dimension of man.

[Vincent D. Breen]
REVEREND VINCENT D. BREEN

Subscribed and sworn to before me
this 22nd day of March, 1979.

Notary Public

My Commission expires:

Catherine D. Dumphy
Notary Public, State of New York
No. 41-4506593
Qualified in Queens County
Commission Expires March 30, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, FLORENCE FLAST, HELEN HENKIN, HAZEL SMITH, DENISE KROUSER and CHRISTINA WALKER,

Plaintiffs,

-against- 88 Civ. 96 (JG)

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK and CHANCELLOR and BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants,

-and-

RACHEL AGOSTINI, et al. and LEAH SAYS, et al.,

Defendant-Intervenors.

AFFIDAVIT OF CATHERINE HICKEY

Catherine Hickey, being duly sworn, proposes and says:

1. I am the Superintendent of Schools of the Roman Catholic Archdiocese of New York. I have been Superintendent of Schools since 1989. My administrative responsibilities include overall supervision of the elementary and secondary parochial schools in the counties of Richmond, New York, Bronx, Westchester, Putnam, Dutchess, Rockland, orange, Ulster and Sullivan.

2. I make this affidavit with the understanding that it will be submitted to the Court in connection with the cross-motions for summary judgment in this case.

3. I have reviewed the affidavit that was executed by Monsignor John J. Healy on March 22, 1979 and submitted to the United States District Court for the Southern District of New York in National Coalition for Public Education and Religious Liberty, et al. v. Califano (76 Civ 888). I understand that affidavit was subsequently made part of the record in this Court in Felton v. Califano (Docket No. 78C 1750) -- the case that was subsequently decided by the United States Supreme Court under the name Aguilar v. Felton, 473 U.S. 402 (1985). A copy of that affidavit is attached hereto as Exhibit A.

4. Some of the statistical information contained in Msgr. Healy's 1979 affidavit is no longer current. Today there are 144 Catholic elementary schools and 39 Catholic secondary schools serving approximately 77,000 students in the counties of New York, Bronx and Richmond. A total of 9,463 students from 98 of those schools received services under Chapter 1 during the 1993-94 school year. Those 98 schools have a total student population of approximately 41,000, of whom 27.5 percent are non-Catholic. The non-Catholic student enrollment in 18 of the 98 schools whose students receive Chapter 1 is more than 50 percent, and in particular schools the non-Catholic population is as high as 75 and 85 percent. We do not have records that would show the percentage of those who receive Chapter 1 services who are non-Catholic, but there is no reason to believe that that percentage is materially different from the non-Catholic population in the schools those students attend.

5. With the exception of statistics that are out-of-

date, the information contained in Msgr. Healy's 1979 affidavit remains true today. In particular, I agree with Msgr. Healy's, general description of the Catholic schools whose students receive Chapter 1 [then Title I] services, and with his comparison of those schools to the profile contained in certain of the Supreme Court's decisions.

6. I understand that the plaintiffs in this case have maintained that the "purpose and effect" of the current Chapter 1 program in New York "is to keep alive religious schools in this City by subsidizing a substantial portion of their general education program," that the "vast majority" of church-related schools in the city "might not exist today" without Chapter 1 assistance, and that unless Chapter 1 funding is increased these schools "are not likely to continue to exist, at least as schools with a general educational program." Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment ("Pl. Mem."), at 58. These assertions are completely inaccurate insofar as the Catholic schools in the Archdiocese are concerned. Chapter 1 funds are not given to the schools themselves, but are received by the New York City Board of Education and disbursed for the benefit of economically and educationally deprived school children. Those funds do not, directly or indirectly, subsidize any portion of the general educational program of the schools of the Archdiocese. The services that are provided to students under Chapter 1 are supplemental to the general educational services provided by the schools, and they are provided only to educationally disadvantaged students, not to the general population of students. They have not replaced any educational services that were previously offered by the Catholic Schools in the Archdiocese. As noted in Msgr. Healy's 1979 affidavit (at 6), the Catholic elementary and secondary schools in the Archdiocese did not provide the types of remedial

educational services available under Chapter 1 prior to the commencement of the Title I program in New York in 1966. If these services were to become unavailable under Chapter 1 -- or if additional restrictions were to be imposed that made it more difficult for students to receive those services -- the consequence would be that students would go without these important remedial services. The Catholic schools in the Archdiocese would not have the financial resources to provide the same services. The unavailability of those services would obviously impair the academic progress of some of the students in our schools, but it would not have any material effect on the financial condition of the schools themselves.

7. The Catholic Schools in the Archdiocese are under financial pressures, as are all schools. But those pressures are not relieved by Chapter 1 funding, because that funding does not flow to the schools and does not relieve the schools even indirectly of any financial burden that they would otherwise bear. Moreover, the financial pressures under which we operate do not pose a threat to the existence of our schools. Those schools are financially stable and enjoy the broad support of their local parishes and communities. They will continue to enjoy that support, I believe, as long as they continue to provide young girls and boys with a quality education in a disciplined and supportive setting.

[Catherine Hickey]
Catherine Hickey

Subscribed and sworn to before
me this 31st day of May, 1995.

Notary Public

My Commission Expires: 1/13/96
Richard E. Barnes
#02BA4990734

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al.,

Plaintiffs,

V. 76 Civ. 888 (CHT)

JOSEPH A. CALIFANO, Secretary of the United States Department of Health, Education and Welfare, et al.,

AFFIDAVIT OF REVEREND MONSIGNOR JOHN J. HEALY

Defendants

and

JAMES and BESSIE BOVIS, et al.,

Intervenor-Defendants,

and

PHILIP and IDA FENSTER, et al.,

Intervenor-Defendants

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

REVEREND MONSIGNOR JOHN J. HEALY, being

duly sworn, deposes and says:

1. I am the Secretary of Education and Director of the Department of Education of the Roman Catholic Archdiocese of New York. My administrative responsibilities include overseeing the education of 140,630 students in the Catholic elementary and secondary schools in the Counties of Richmond, New York, Bronx, Westchester, Putnam, Dutchess, Rockland, Orange, Ulster and Sullivan.

2. I make this affidavit on behalf of the several defendants in this matter, with the understanding that it will be submitted to the Court as part of the joint exhibits to be filed by the several defendants.

3. I have been Secretary of Education of the Archdiocese of New York since August 1, 1978. From January 1, 1976, to July 31, 1978, I served as Deputy Secretary of Education. Prior to 1976, I served as Associate Secretary of Education.

4. In my position as Secretary of Education of the Archdiocese of New York, I have become familiar with the operation of the Catholic elementary and secondary schools within the Archdiocese. There are 287 Catholic elementary schools and 69 Catholic secondary schools in the ten counties that constitute the New York Archdiocese. Of that total number of schools, 159 Catholic elementary schools and 48 Catholic secondary schools are located in the Counties of New York, Bronx and Richmond, counties within the Archdiocese for which the New York City Board of Education has responsibility for the operation of the public school system. Approximately 95,698 students are enrolled in the Catholic elementary and secondary schools in those three counties.

5. In my position as Secretary of Education of the Archdiocese of New York, I have become familiar with the programs of remedial education made available through the New York City Board of Education to economically and educationally disadvantaged children who attend nonpublic schools in New York City under Title I of the Elementary and Secondary Education Act of 1965 (Pub. L. No. 89-10) (hereinafter "Title I"). According to information compiled by the New York City Board of Education for the 1977-1978 school year, 15,109 students attending 97 Catholic elementary and secondary schools in Manhattan, the Bronx and Staten Island were eligible, on the basis of economic and educational deprivation, to receive Title I services during that school year. Of the eligible Title I students in those schools, 7,781 actually received Title I remedial services.

6. Prior to the commencement of Title I remedial services for nonpublic school students in New York City in 1966, the Catholic elementary and secondary schools in the Archdiocese of New York did not have the financial resources to provide to economically and educationally disadvantaged students any of the types of remedial educational services presently available under Title I. If, for any reason, those Title I remedial educational services were no longer available to qualified students in the Catholic elementary and secondary schools in the Archdiocese of New York, the schools themselves would not have the economic resources to provide the services on their own.

7. I have reviewed several decisions of the United States Supreme Court deciding the constitutionality of public aid programs benefiting church-related elementary and secondary schools and the descriptions of those schools contained in those opinions. In particular, I have examined the decisions in Committee for Public Education v. Nyquist,

413 U.S. 756 (1973), and Levitt v. Committee for Public Education, 413 U.S. 472 (1973), which invalidated programs of aid to church-related schools and their students enacted by the New York Legislature. Each of those decisions contained what the Court identified as a "profile" of church-related elementary and secondary schools in New York State. Based on my review of those decisions and my knowledge of the Catholic elementary and secondary schools in the Archdiocese of New York, I can state that the "profile" of the church-related elementary and secondary schools recited in those opinions does not accurately describe the Catholic elementary and secondary schools under my supervision which have Title I programs under the auspices of the New York City Board of Education.

General Observations

8. Before addressing the specific elements of the "profile" contained in the Nyquist and Levitt decisions, a few general observations about the Catholic elementary and secondary schools under my supervision are appropriate. The focus of the general and specific observations which follow is on those Catholic elementary and secondary schools which have Title I programs. Because those schools are located in the inner city and have significant non-Catholic student populations, they have characteristics that defy stereotyping.

9. The underlying objective of the Catholic elementary and secondary schools under my supervision is to provide a sound education to their students so that those students can become responsible, productive and moral Citizens. While the public schools have a comparable central objective, our schools are distinctive from the public schools in that we add to an otherwise complete education

instruction in religion, and that we consciously and explicitly address questions of morals and values when those questions are relevant to the subject matter being taught.

10. A concern for religion and religious values has always been central to the Catholic philosophy of education. However, Catholic educators are aware that such a concern is not theirs exclusively. Much of what is taught to students in the elementary and secondary grades, wherever they attend school, is value-laden, and no conscientious teacher can ignore the value implications of what might otherwise be considered a secular subject matter. For example, any treatment in a social science class of the civil rights movement of the past 20 years involves the teacher in forming a value judgment on the dignity of individual persons. The "religious" values that are addressed in Catholic elementary and secondary schools, and particularly those with a significant non-Catholic student population, are not narrowly parochial or sectarian in nature, but rather more broadly Christian in recognition of the Judeo-Christian heritage of this nation. Our schools also constantly stress moral, as distinct from precisely religious, values. These include responsibility, tolerance, brotherhood, thoughtfulness and studiousness.

11. The concern for religion and religious values which is central to the philosophy of Catholic schools in no way dilutes or distorts the content of what would be considered secular, as opposed to religious education, courses. Indeed, a document issued in 1977 by the Vatican's Sacred Congregation for Catholic Education admonished Catholic educators as follows:

> "Individual subjects must be taught according to their own particular methods. It would be

> wrong to consider subjects as mere adjuncts to faith or as a useful means of teaching apologetics. They enable the pupil to assimilate skills, knowledge, intellectual methods and moral and social attitudes, all of which help to develop his personality and lead him to take his place as an active member of the community of man." The Catholic School, § 39 (a document issued by the Sacred Congregation for Catholic Education, March 19, 1977).

The Catholic schools under my supervision have consistently adhered to that proposition -- namely, that secular subject matter has its own integrity and must be taught without distortion or intrusion of religious concerns not relevant to the subject matter.

12. There are two fundamental reasons why Catholic elementary and secondary schools under my supervision offer a separable secular education, along with the religious instruction that is provided.

> a. We are obligated under the provisions of the New York State Education Law to offer a curriculum which offers at least the following courses: mathematics, reading, writing, English language, geography, U.S. history, civics, health education, physical education, New York State history, science and safety education. We are also obligated to provide our students in those courses with a body of knowledge comparable to that provided the students in the public schools in the state so that our students can perform satisfactorily on standardized tests provided by state officials to

both public and nonpublic school students.

b. Even in the absence of those obligations imposed by state law, however, our schools would still provide a curriculum of the type described above. The obligations of our schools extend far beyond the religious needs of our students -- they extend to their temporal requirements. We would be failing in our obligations as educators and would have no right to sponsor schools if we did not provide our students with that education which is necessary for them to be responsible and productive citizens.

That Catholic schools teach secular subjects both objectively and well is attested by the readiness of public and private high schools, colleges and universities to admit graduates of those schools.

13. Against this background of the general educational philosophy of the Catholic elementary and secondary schools under my supervision, it is appropriate to address the specific characteristics of the "profile" of those schools which the Supreme Court used to decide the Nyquist and Levitt cases.

Religious Mission

14. One of those characteristics is that the schools that the Court was examining were an integral part of the religious mission of the church sponsoring it." While the words quoted are, standing alone, unobjectionable as a description of the motivation of many persons who sponsor our schools, they are misleading in the inferences that the Supreme Court drew from them as a characteristic of the

educational process of Catholic elementary and secondary schools. They are especially misleading for the Catholic schools that have Title I programs provided by the New York City Board of Education.

15. It cannot be denied that any enterprise undertaken by the Roman Catholic Church is religiously motivated. Thus, the operation of elementary and secondary schools by parishes and a diocese is consistent with that generosity which is central to the mission of the Roman Catholic Church and mandated by its Founder. But so is the care of the hungry or the ill-housed, and motivation in no way clouds or dilutes such assistance. The difficulty lies in defining the precise nature of that religious mission relative to educating children in need of remedial instruction.

16. In this regard, a central fact about Catholic elementary and secondary schools is that they are community based -- that is, the overwhelming number of those schools are sponsored by a parish which is located in a particular community and which draws its students from that community. Those schools of necessity, therefore, reflect the ethnic, cultural, economic and religious profile of their communities. These factors can, do and should affect the educational philosophy and practice of each school. And, while general policies and goals are set forth at the diocesan level covering such diverse matters as health and safety regulations and curriculum content, how those policies and goals will be implemented by each school depends on the needs and the skills of its population. Indeed, in many of the schools in the Archdiocese, those policies and goals are implemented by parish school boards that are composed of the parents of students, who in Title I schools include a number of non-Catholics.

17. The eligibility requirements for student participation in Title I remedial programs are such that those programs will be found only in those Catholic elementary and secondary schools that are in that portion of the metropolitan area which we have come to call the "inner city." That fact, which is essential to understanding the work of Title I Catholic elementary and secondary schools, necessarily defines the educational mission of the schools which is in no way compromised by the religious motivation that is the foundation of the desire to serve the ill-educated, as much as it is to serve the ill-fed.

18. Because they are located in inner-city communities, the Title I schools in Manhattan, the Bronx and Staten Island draw their students from highly concentrated minority populations. When those schools are located in certain areas in the inner city, the population from which the students are drawn is overwhelmingly Black and contains a large number of non-Catholics. The majority of the students attending several Catholic elementary schools in areas with large Black populations are not of the Roman Catholic faith.

19. Moreover, while the responsibility for financing the operation of elementary schools rests with the parish or parishes sponsoring those schools, the Archdiocese has found it necessary over the past seven years to provide a subsidy to inner-city schools with significant non-Catholic student bodies to keep them in operation. The Archdiocesan Commission for inter-Parish Financing has distributed approximately $2.5 million each year, principally to parishes which operate schools with Title I programs. Ninety percent of the money has been used to defray deficits incurred by the Title I schools. In the 41 elementary schools receiving funds from the Commission for Inter-Parish Financing, there are

16,245 students, of which 2,623, or approximately 16 percent, are non-Catholic. In addition, the Archdiocese has an Inner City Scholarship Fund which has awarded scholarships exclusively to students at 56 inner-city schools with Title I programs in Manhattan and the Bronx. During the 1978-1979 academic year, some $300,000 was provided by that Fund for tuition subsidies for students in those Title I schools.

20. In light of the fact that there are substantial diocesan subsidies to inner-city Title I schools with significant non-Catholic student bodies, a question arises as to what "religious" mission the Archdiocese is fulfilling in maintaining such schools. The answer is clear to those who understand the deep concern that the Catholic Church, in general, and Catholic educators, specifically, have for those people who are victims of economic deprivation, whether they are Catholic or not. The mission is one of social and community action, which is reflected in the willingness of the Catholic Church to divert its resources from strictly religious activities to aid those who are the victims of social, economic and cultural disadvantage or racial discrimination. A long-standing mission of the Roman Catholic Church has been to alleviate the effects of social injustice, and that mission is fulfilled in part by the continued operation of inner-city Title I schools for the benefit of the community, irrespective of whether those schools serve a predominantly Catholic population.

Obedience to Doctrines and Dogmas

21. Another of the characteristics of the "profile" of Catholic elementary and secondary schools contained in the Nyquist and Levitt decisions is that they "require obedience by students to the doctrines and dogmas" of the

Catholic faith. I can state unequivocally that no Catholic school under my supervision has any such purpose or serves any such function.

22. While the religious education provided by Catholic elementary and secondary schools reflects a concern that students receive, in their normal educational setting, an exposure to the teachings of the Roman Catholic Church and Christianity in general, it is not the function of a school to compel its students to believe anything, religious or otherwise. The purpose of a school is strictly to provide its students with the information and means of analysis so that they can come to a better understanding of the subject matter, whether that subject matter is religious or secular in nature. Our schools would be untrue to their functions as educational institutions if they sought to compel students to accept one religious viewpoint or another, just as they would be shirking their responsibility if they compelled the students to accept one interpretation of Shakespeare rather than another or one explanation for the American Civil War rather than another.

23. Our schools would not only diminish their standing as quality educational institutions if they sought to compel obedience of students to the doctrines and dogmas of the Roman Catholic Church. They would also be acting contrary to the very doctrines of that Church. A central principle of Roman Catholic theology is that religious faith must be freely given and freely accepted. Under that precept, nothing may be done by the Church, or anyone acting on its behalf, that would seek to coerce the conscience. Thus, those responsible for the operation of Catholic elementary and secondary schools would be untrue to their own beliefs if they sought to compel the students to obey the doctrines and dogmas of the Church.

Inculcation of Religious Values

24. A third characteristic of the "profile" schools in the Nyquist and Levitt decisions was that they had "as a substantial purpose the inculcation of religious values." That characteristic is neither a purpose nor a function of the Catholic elementary and secondary schools under my supervision.

25. The word "inculcate" has connotations which are inconsistent with the educational process. It suggests both in its connotations and literal definition an effort to induce students to accept ideas or values through coercion. Our schools do not engage in that activity, whether religious values or other aspects of learning are involved.

26. By denying that our schools "inculcate" religious values, I do not mean to suggest that exposure of students to religious values is in any way foreign to our schools or our educational program. Our schools have as a central concern that students be aware of Catholic values and examine those values critically. That concern is expressed not only in our religious education classes, but also in our practice of examining the relationship of religious or moral values to the entire learning process where such values are relevant to the subject matter. But we do not seek to force our students to adopt religious values that they cannot or do not freely accept.

Admission Requirements

27. A further characteristic of the "profile" schools in the Nyquist and Levitt decisions is that they "impose religious restrictions on admissions." The Title I Catholic elementary and secondary schools under my

supervision do not operate under any such restrictive admissions policy.

28. Because most of the schools under my supervision are supported by the revenues of the parishes which sponsor them, preference in admissions is given to children of those persons who provide revenue to the parish -- namely, parishioners who contribute regularly to the parish. Because of that policy, first preference for available places in the schools under my supervision would be given to the children of those Catholic parents.

29. However, once the needs of the children of parishioners are met, remaining spaces at the school are open without consideration to the religious affiliation of the student or of his parents. Indeed, the prevailing policy is to give preference, after the needs of children of parishioners are met, to others living within or close to the geographical boundaries of the parish. By definition, the second level of preference is for students who are not of the Catholic faith.

30. That these policies do not restrict admissions on religious grounds is most dramatically illustrated by the Title I Catholic elementary and secondary schools under my supervision. Of the approximately 34,000 students enrolled in the 79 Catholic elementary and secondary schools in Manhattan, the Bronx and Staten Island which have Title programs on their premises, approximately 14.7 percent are of a religious faith other than Catholic. The percentage of non-Catholic students in the Title I schools is even higher in those areas with predominantly Black and Asiatic populations. For example, several Title I schools serving those communities have student populations that are more than 60 percent non-Catholic.

31. The predominance of Catholic students in the enrollment statistics is a natural consequence of our desire to see that children of those who support the parish, which supports the school, should in equity have free access to those schools. However, those schools remain community-based and welcome all members of the community to the school when the needs of parishioners have been satisfied. Whenever the community in which the school is located has a significant non-Catholic population, the consequence of our admissions policy is to invite significant numbers of non-Catholics to be educated in our schools.

Faculty Hiring Policies

32. Another aspect of the "profile" schools described in the Nyquist and Levitt decisions is that they impose "religious restrictions on faculty appointments." To my knowledge, teaching positions in the Catholic elementary and secondary schools under my supervision are not restricted to Roman Catholics. Hiring is a responsibility of the individual schools; the Archdiocesan office serves simply as a clearinghouse for applicants who are seeking teaching positions in the Catholic elementary and secondary schools. The Archdiocesan school office retains a file of applications, and the names of qualified applicants are made available to individual schools as teaching positions become available.

33. The teacher application form currently used by the Archdiocese requests information concerning the religious affiliation of the applicant. No application is rejected and no applicant is denied referral to a school because he or she is of a religious faith other than Roman Catholic.

34. Individual schools have broad latitude in

deciding whether or not to hire an applicant referred to them by the Archdiocesan school office. Under Archdiocesan policies, no applicant is referred who does not have sound academic qualifications, a matter of primary consideration. As a matter of Archdiocesan policy and practice by individual schools, no person will be hired for a teaching position if he or she is openly hostile to the Roman Catholic Church or its belief system. Barring such aggravated sentiments, non-Catholic applicants experience no discrimination in the hiring process. In the employment interview, all applicants are made aware of and asked if their consciences would allow them to cooperate with the policies of the school, the religious education program, value education and the general Catholic atmosphere of respect for each other, for learning and for God.

35. I am aware that there are teachers employed by Catholic elementary and secondary schools under my supervision who are not Roman Catholics. This is particularly true in schools with significant numbers of Black students, where role models are important and where there are very few Black Catholics with the requisite academic qualifications to draw from. The precise number of non-Catholics teaching in Archdiocesan schools is difficult to determine because the school census cards received by my office do not classify teachers by religious affiliation. However, an inquiry of a random sample of Title I schools revealed that 15 non-Catholics were teaching in the schools contacted, and I am aware that is not the total number of non-Catholic teachers in our system. For example, I know that 20 of a total of 359 lay teachers employed by Archdiocesan high schools are not Catholic. Unlike parish elementary schools, the direct administration of those high schools is a function of the Archdiocesan office. These statistics amply demonstrate that the schools of the

Archdiocese do not restrict the hiring of teachers on religious grounds.

Religious Restrictions on Course Content

36. Another feature of the "profile" schools in the Nyquist and Levitt decisions is that they "impose religious restrictions on what or how the faculty may teach." That characteristic does not accurately describe the Catholic elementary and secondary schools under my supervision.

37. The emphasis in the religious education classes in the overwhelming majority of the schools under my supervision is on the teachings of Christianity as the Roman Catholic Church formulates them. Those responsible for teaching the religious education classes must have a thorough understanding of the teachings of the Roman Catholic Church and are required to teach them accurately, not presenting anything as Catholic doctrine which is not factually so. This restriction, however, does permit and indeed encourages those responsible for religious education to explain the positions taken by other Christian denominations or other religious faiths on particular issues that are within the purview of the religious education curriculum.

38. There are no religious restrictions on the secular content of the secular subjects offered in the Catholic elementary and secondary schools under my supervision. The secular content of those secular courses has its own academic integrity, and it would be a gross distortion of the educational process to restrict the secular content of those courses because of the religious beliefs of the Roman Catholic Church.

39. It is true, of course, that in the educational process there is not always a sharp line dividing the secular from the religious. In history, for example, a large part of the story of the development of Western civilization is the story of the impact of Christianity on Western civilization. Of necessity, the course in Western Civilization will touch upon the conflicts that divided the Christian Church into various denominations and sects. If the historian's objective account of the precise points of conflicting theological dogma is inconsistent with the Roman Catholic theologian's account, the reconciliation, if there is to be one, should be made by the theologian and not the teacher of history. However, the teacher who must include an historical account of the Reformation in a class in one of the schools under my supervision would be expected to give the account that is most consistent with the best available historical materials and not necessarily the account that is consistent with a Roman Catholic theologian's view of the Reformation.

40. Some of the secular subjects taught in the schools under my supervision also touch upon questions of morals and values. Teachers are not restricted on how they approach such subject matter, but are encouraged to expose students to the moral and value dimension of the subject matter within a Christian framework and not to shun those issues.

Attendance at Religious Instruction

41. An additional feature of the "profile" schools in the Nyquist and Levitt decisions is that they "require pupils to attend instruction in the theology or doctrine of a particular faith." It is true that all students enrolled in the schools of the Archdiocese take a course in religion as a part of the Curriculum. However, to the extent that this

characteristic of the "profile" implies that the content of the religious instruction offered is narrowly sectarian in content or is taught to compel adherence by students to particular religious beliefs, it does not accurately portray the schools under my supervision.

42. As previously explained in this affidavit, courses in religious education are a regular part of the curriculum of the schools under my supervision and the emphasis in those courses is on the teachings of Christianity as the Roman Catholic Church formulates them. Parents of children who are not members of the Roman Catholic faith are informed of these features of the curriculum prior to enrollment.

43. The religious instruction offered in the schools under my supervision is not limited to the specific doctrines and dogmas of the Roman Catholic Church, although religious teachings and beliefs that are peculiar to the Roman Catholic Church are explained to the students. However, the Roman Catholic Church is part of a much broader Christian community, and the religious instruction in the Archdiocesan schools includes much of what the Roman Catholic Church shares with other Christian denominations. In addition, religious teachings of other denominations that conflict with Roman Catholic teachings are explained to students so that they will have a better understanding of the nature of religious belief.

44. Moreover, a central goal of the religious instruction program is to show students the importance and value of services to others. Thus, as an extension of the religious instruction program, students are encouraged to participate in tutoring younger students, visiting elderly persons who are shut-in or hospitalized, and activities such

as Red Cross Walk-a-Thons and the Cerebral Palsy reading program.

45. No effort is made in the religious education courses offered by the schools under my supervision to compel any student, whether Catholic or of some other religious faith, to accept as valid or to adhere to the beliefs of the Roman Catholic Church. Those beliefs are explained and explored in the religious education classes in the same manner that other subject matter taught in those schools is explained and explored, and students are free to accept or reject those beliefs according to their own consciences.

46. Parents of children who subscribe to a religious faith other than the Roman Catholic faith enroll their children in the schools under my supervision for a variety of reasons. One of their motivations is that they themselves are strongly religious people -- whether they be Baptists or Muslims or Buddhists -- and they wish their children to be exposed to religious values. They enroll their children in Catholic elementary and secondary schools at considerable expense to themselves, and their primary objective is to obtain a sound education for their children and not because they want their children exposed to any proselytizing efforts by the schools. In confirmation of this fact, to my knowledge there has never been an instance of a non-Catholic student removed from a Catholic elementary or secondary school because the student was forced to believe or engage in a religious practice in violation of that student's own conscience or belief system.

Attendance at Religious Activities

47. A final characteristic of the "profile" schools in the Nyquist and Levitt decisions is that they "require

attendance of pupils at religious activities." The Catholic elementary and secondary schools under my supervision engage in that practice. However, non-Catholic students are not permitted to participate in some religious activities, such as reception of the Sacraments.

48. Most of the Catholic elementary and secondary schools under my supervision have some form of religious observance as part of the school day. Most typically, that religious observance will be in the form of a prayer recited at the beginning or the end of the school day, or before instruction begins in a particular class. In addition, during regular school hours on an occasional basis most schools will schedule more formal liturgical observances, such as attendance at Mass by a class or the entire school. All students enrolled in the schools are expected to be present for such religious observances, but the degree or extent to which they participate in those observances is a matter of conscience for the individual student, and that freedom of conscience is scrupulously observed by teachers.

49. The parents of students who subscribe to a religious faith other than the Roman Catholic faith are told prior to registration that their children will be expected to be present for the types of religious observances that I have described. To my knowledge, no parent of a student who is of a religious faith other than the Roman Catholic faith has complained that the student's participation in those religious observances has in any way compromised the student's own religious beliefs or practices.

Conclusion

50. I have attempted in this affidavit to describe

accurately the policies and practices of the Catholic elementary and secondary schools under my supervision as they relate to the various characteristics of the "profile" schools that the Supreme Court described in the Nyquist and Levitt decisions. As the information I have supplied should make clear, the schools under my supervision depart significantly from the schools of the "profile." That is particularly true of those schools which have Title I programs under the auspices of the New York City Board of Education -- schools which have a significant number of non-Catholic students.

51. By distinguishing those schools from the characteristics of the "profile" schools, I do not intend to deny that those schools serve religious functions or have religious objectives. However, where the "profile" attempts to portray such schools as having a singular and overriding objective of indoctrinating students in the Roman Catholic faith or compelling them to subscribe to the beliefs of the Roman Catholic Church, the "profile" distorts and misstates the total educational mission of those schools.

52. The basic objective of the Catholic elementary and secondary schools under my supervision, including those with Title I programs, is to provide their students with a sound education in an environment in which the students are exposed to religious education and religious values. Our goal is to produce students who have the knowledge and intellectual skills to be responsible and productive members of their communities and who are also aware of the religious heritage of our society.

[John J. Healy]
REVEREND MONSIGNOR JOHN J. HEALY

Subscribed and sworn to before
me this 22 day of March, 1979.

Notary Public

My Commission expires:

Josephine Raymond
Notary Public, State of New York
No. 31-8505425
Qualified in New York County

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

-and-

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Intervenor-Defendants.

REPLY DECLARATION

78 CV-1750 (JG)

MARGARET O. WEISS, declares, pursuant to 28 U.S.C. § 1746, under penalty of perjury under the laws of the United States of America, that the following is true and correct:

1. I am the Director of the Bureau of Nonpublic School Reimbursable Services of the Board of Education of the City School District of the City of New York. I submit

this declaration in reply to plaintiffs' opposition to defendant Chancellor of the Board of Education of the City of New York's motion for relief from the judgment in this action, and in further support of the Chancellor's motion.

Public School Sites and Space Limitations

2. As noted by plaintiffs' counsel, Stanley Geller, in his declaration dated December 26, 1995 (hereafter "Geller Decl.") (at paragraph 19), when the post-Aguilar plan was developed in the spring of 1986 to comply with this Court's judgment, the Board of Education of the City School District of the City of New York (hereafter the "Board of Education" or the "Board") was able to offer services in public school sites to the Chapter 1 students in 80% of the participating private schools, or 194 of the 242 participating private schools. The term "private school," as used herein, refers to schools which are affected by the judgment in this case.)

3. However, of these 194 private schools, the parents and principals of only 52 private schools accepted the offered public school sites. Thus, only 3,578 private school students received Chapter 1 services at public school sites during school year 1986-1987. As discussed in my Declaration of October 16, 1995 in support of the Chancellor's motion (hereafter "Initial Weiss Decl.") (at paragraph 32), the primary reasons given for declination of the public school sites were the loss of classroom instructional time caused by travel time between the private and public school sites, and concerns regarding safety during transit between the private and public school sites.

4. Even in the 1986-87 school year, there was insufficient space in the public schools to accommodate all

private school students who had been receiving Chapter 1 services. Accordingly, 70 Mobile Instructional Units were obtained to provide additional sites for Chapter 1 services for private school students. Further, 13 Leased Sites were obtained which also provided additional space for Chapter 1 services.

5. However, during the 1986-1987 school year, the use of these three methods of service delivery resulted in only 10,661 private school students from 141 private schools receiving Chapter 1 services in New York City. This was an enormous decrease in the number of private school students served. During the 1985-1986 school year (the final year in which the Board provided Chapter 1 services to private school students by sending its teachers and other professional staff into the private schools) 20,965 students from 247 private schools received Chapter 1 services in New York City. Accordingly, 10,304 fewer private school students received Chapter 1 services in New York City after the post-Aguilar plan was implemented. This represents a decrease of approximately 50% in the number of private school students served by Chapter 1.

6. This loss of services for 10,304 students, who were in need of remedial education because of below grade educational achievement, and who resided within defined poverty areas, was an educational tragedy. Accordingly, the Board of Education worked to develop and expand the other methods of service delivery -- Computer Assisted Instruction, Mobile Instructional Units and leased sites -- which are now used to provide Chapter 1 services for private school students (in addition to public school sites). Over the intervening years, the use of these three other service delivery methods has resulted in the restoration of the participation level of private school students in the Chapter

1 program to approximately the pre-Aguilar level; in school year 1993-1994, the Board of Education provided Chapter 1 services to 21,795 students from 257 private schools.

7. Further, as is thoroughly described in the January 1995 Report of Alan G. Hevesi, Comptroller of the City of New York, Overcrowding in New York City Public Schools: Where Do We Go froin Here? (the report is annexed as Exhibit "7" to the Initial Weiss Decl., see also paragraphs 35-38 of the Initial Weiss Decl.), since 1989, there has been an explosive growth in public school enrollment in the City of New York, which has led to severe overcrowding in the public schools. The public school population has grown 10%, from 940,208 students to 1,034,235 students, in the eight year period from October 1986 to October 1994. As a result, the public school system is now so crowded that 90,000 students, which is 9% of the public school population, lack regular classroom seats.

8. As a result of the severe overcrowding, the Board of Education has lost 23 of the public school sites that it used for Chapter 1 services for private school students in the early years of the post-Aguilar Chapter 1 program. Thus, the availability of pubic school sites for the provision of Chapter 1 services to private school students is significantly less now than it was in 1986, when the post-Aguilar plan was first developed. Nor is the situation likely to improve. The Comptroller finds that there is insufficient time and, due to the current budget problems, insufficient funds, to build enough new public school facilities to meet the need for increased public school space. Further, based on studies of patterns of birth rates and immigration, it is projected that the current extraordinary growth rate (an increase of approximately 20,000 students per year) will continue into the next decade, and that the severe

overcrowding situation will get even worse. The projection is that the enrollment in the New York City public schools will increase by over 240,000 in the nine years between 1993 and 2002. In 2002, the projected total public school enrollment will be over 1,256,000. (Exhibit "7" to the Initial Weiss Decl. pp. ES-1, 23-27, 36).

9. Plaintiffs' counsel asserts that notwithstanding this severe overcrowding situation, the Board of Education should serve all private school students receiving Chapter 1 services at public school sites, and then suggests that this can be done by utilizing the same methods to reduce overcrowding for public school students proposed in the Comptroller's Report. (Geller Decl., paragraph 20).

10. First, as the Comptroller's Report makes clear, the principle proposed methods to relieve overcrowding for public school students -- building new schools or expanding existing schools (Exhibit "7" to the Initial Weiss Decl., pp. 26-27, 36, 51), bussing students to schools which are often far from their homes (Exhibit "7," pp. 30-35), "double shifting" (having the student population attend school on two different schedules during the day) and changing to a year-round school calendar (Exhibit "7," pp. 43-49) -- have not yet been either implemented or widely implemented for the variety of reasons discussed in the Report, and where implemented, have not been successful in adequately addressing the existing overcrowding problem for the public school student population.

11. According to the Comptroller's Report, building or expanding schools is both too slow and too expensive (Exhibit "7" to the Initial Weiss Decl., p. 36), bussing students to distant schools meets with strong resistance from public school parents who do not want their

children to spend additional travel time and do not want them attending school in a remote location (Exhibit "7," p. 32) and "double shifting" can adversely affect both the quantity and quality of education, by creating such problems as school days beginning and/or ending after dark, the disruption of after school activities and deterioration in the quality of the school environment (Exhibit "7," pp. 38-42). The proposed year-round school calendar has not been implemented in New York City, and prior to implementation, there would be many problems to overcome, such as the absence of air conditioning, parent and staff resistance and legal requirements. (Exhibit "7," pp. 48-50).

12. Further, the problems created by bussing public school students to distant schools for the entire school day, are even more problematic for Chapter 1 private school students, who are normally receiving Chapter 1 services for approximately one hour during their regular school day. It is simply not possible to bus private students to a distant pubic school site during the course of their regular school day; the loss of their regular class instructional time would be too great. In addition, double shifting is not even relevant to these private school students, since they are receiving Chapter 1 instruction for approximately an hour during a school day. Furthermore, their regular school day schedule is established by their private school, not by the Board of Education.

13. Finally, another solution to relieve overcrowding discussed by the Comptroller is the use of leased space for classroom use. (Exhibit "7" Initial Weiss Decl., pp. 27-30). This is a method the Board of Education already utilizes to provide Chapter 1 services to private school students.

The Cost of Mobile Instructional Units (hereafter "MIUs")

14. Plaintiffs' counsel states that the cost of the MIUs was found to be "extremely extravagant" by the Office of the Comptroller of the City of New York (Geller Declaration, paragraph 27) and attaches a letter as Exhibit BB," to his Declaration, dated April 26, 1988, from Roger D. Liwer, Director of Audits of the Office of the Comptroller to Steven Schwager, Chief School Business Executive of the Board of Education. This letter does not state that the cost of the MIUs was "extremely extravagant," although the letter does state that the Board should have obtained MIUs at less cost. In addition, this letter is not a final report of the Comptroller's Office, but as stated on page 1 of the letter, simply documents some "preliminary findings."

15. Plaintiffs' counsel has not attached Mr. Schwager's response to Mr. Liwer, by letter dated April 28, 1988, which is annexed hereto as Exhibit "I." Mr. Schwager pointed out many errors and incorrect assumptions in Mr. Liwer's letter. For example, Mr. Schwager noted that the conclusion that the cost of the Board of Education's MIUs was higher than necessary, was based in large part on a "cost" comparison of the Board's mobile instructional units with mobile instructional units used in other jurisdictions, and that the comparison was defective. Mr. Schwager pointed out that the costs of most MIUs from other jurisdictions cited by Mr. Liwer covered only the cost of the vehicle. Mr. Liwer then compared that cost to the Board of Education's cost. However, the Board of Education's cost figure includes not only the cost of the vehicle, but the cost of the unionized driver (whose salary and fringes exceed $30,000 per year), as well as the costs of maintenance, repairs, cleaning, garaging, fuel and insurance.

16. In addition, the Board of Education's MIUs were not a standard model, but were custom designed. Although this made each unit more expensive, as Mr. Liwer noted, it allowed the Board of Education to design each MIU to simultaneously house two Chapter 1 functions; the custom design contains both an instructional area for a staff person and up to ten students, and a second small group area in which a staff person (such as a guidance counselor or school psychologist) can meet with a student and/or parent, an English as a Second Language teacher can provide small group instruction for up to four students, and consultation between staff or between a parent and staff can be held. Had the Board of Education used the same standard models as other jurisdictions cited by the Office of the Comptroller, only one activity could have occurred in each MIU at any one time. The cost of each unit would have been somewhat less, but a significant number of additional units would have been required to fulfill the same functions and the overall expenditure for MIUs would have been greater. Finally, the custom design allowed the Board of Education to incorporate very stringent safety features in the design, as mandated by the New York City Fire and Building Departments.

17. Plaintiffs' counsel also states that the Board of Education could have obtained Stationary Instructional Units (hereafter "SIUs"), which are small structures built to accommodate Chapter 1 classes. (Geller Decl., paragraph 27). Although the Board has not used SIUs as a post-Aguilar delivery method, we did investigate the possibility of using them in our post-Aguilar program.

18. There were several concerns about the use of SIUs. The first was a legal concern. At the time this method was under consideration, in 1987 and 1988, there were serious legal concerns raised by the placing of SIUs on

property owned by religiously-affiliated private schools. The New York State Education Department initially stated, in July 1985, that this was prohibited by Aguilar (see Memorandum from Robert D. Stone, Counsel and Deputy Commissioner for Legal Affairs for the State Education Department, annexed as Exhibit "6" to the Initial Weiss Decl.), and the United States Department of Education stated in June 1986, that SIUs could be placed on the property of religiously-affiliated private schools only in limited circumstances. (See June 1986 Guidance on Aguilar v. Felton and Chapter 1 of the Education Consolidation and Improvement Act, Questions and Answers, question 29, annexed as Exhibit "9" to the Initial Weiss Decl.). The Board accordingly planned to use SIUs, if at all, only in a small pilot program, which could serve to test their legality.

19. With great difficulty, the Board was able to locate three sites after extensive canvassing of the private schools to find available land on either private school property or other nearby available land, such as an empty lot. Vacant land is an extremely scarce commodity in many New York City neighborhoods.

20. We then began investigating the cost of constructing the SIUs. Initially, we anticipated that the cost would be relatively inexpensive, and that we could simply obtain a slightly modified version of the trailers that are used on Construction sites. However, it seems that no endeavor of this nature is ever simple or inexpensive in New York City. For example, in addition to all the New York City health and safety code requirements, we learned that we would also have to comply with any design requirements imposed by the Municipal Art Commission, a body created by the New York City Charter, which is empowered to review designs for buildings and other structures erected on

land owned or leased by local government. We met with the Commission, which proposed significant design modifications to make the structure more visually appealing. (It should be emphasized that their concern was primarily for the exterior appearance and the visual impression given to anyone who would use the street, rather than for the interior of the structure, which would most affect the students.) The Commission suggested we put a peaked roof on the structure, criticized the visual rhythms created by the fenestration (i.e., the windows), etc.

21. We also determined that obtaining an electricity hook-up would be costly. When all these factors were considered, we estimated that the initial cost for constructing each SIU would be $100,000. (See Exhibit "2" annexed hereto, letter to Robert Eshard from Steven Schwager, dated May 26, 1987). Further, the likelihood of vandalism in these high-crime areas was a problem that would have to be addressed through additional operating expenditures for security, insurance and maintenance and repair services. Accordingly, SIUs did not appear to be nearly as cost-effective as originally anticipated.

22. Plaintiffs' counsel also asserts (Geller Decl., paragraph 27) that we could have placed SIUs in "the corners of playgrounds" on public school property. This would have deprived the public schools of a portion of their schoolyards, which are normally used for recreation and physical education. The number of Chapter 1 students in many private schools would have required several SIUs to accommodate the program. This would have meant the loss of a substantial amount of the very limited open space available to the public school. Based upon information provided by the Board's Division of School Facilities, there is no record that any public school has ever been forced to

give up a portion of its schoolyard for the benefit of students from another public school or a private school. Further, it is almost certain that plaintiffs' counsel's proposal would have been bitterly opposed by the affected public schools.

23. In addition, plaintiffs' counsel's proposal would have necessitated the same loss of instructional time through travel that has previously been described in relation to public school and leased sites. One of the primary reasons for using SIUs would have been to eliminate travel and the resulting loss of instructional time.

Additional Factual Assertions

24. Plaintiffs' counsel further asserts (Geller Decl., paragraph 10) that the defendants acknowledge that students who attend Hasidic schools constitute the second largest group of private school students receiving Chapter 1 services in New York City. This statement is inaccurate and has not been acknowledged by defendants. The second largest group of private school students receiving Chapter 1 services in New York City are students attending Hebrew Day Schools. This is a term which is used by the Board of Education to denote all schools which are affiliated with any branch of the Jewish religion. Thus, a Hebrew Day School may be affiliated with a Hasidic Jewish organization, an Orthodox Jewish organization, a Conservative Jewish organization, etc. The Board of Education makes no official inquiry, in the course of administering the Chapter 1 program, as to the affiliations of the Hebrew Day Schools whose students participate in the Chapter 1 program. However, for the purpose of preparing this declaration, a member of my staff who has personal knowledge of the affiliations of the Hebrew Day Schools, reviewed the list of the 42 schools whose students participate in the Chapter 1

program, and informed me that 11 of these schools are affiliated with Hasidic Jewish groups and the remaining 31 Hebrew Day Schools are not affiliated with Hasidic Jewish groups.

25. Plaintiffs' counsel also states that there is a "standard time for a recess between classes" of approximately 10 minutes (10 minutes is the maximum one-way vehicular travel time used in the transport of private school students to Chapter 1 sites). (Geller Decl., paragraph 24). However, approximately 85% of the private schoolchildren served in the Board of Education's Chapter 1 program are in the elementary school grades (kindergarten through sixth grade). In elementary school grades, in both the public and private schools, there are no regular class changes nor recess between classes; students are in one class, and normally stay in the same room with the same teacher for the full school day. Accordingly, when private school students travel to a public school (or leased) site for Chapter 1 instruction during the course of the school day, the time spent traveling is normally time in which they would otherwise be receiving instruction in their regular school class, not "recess" time.

26. Finally, plaintiffs' counsel asserts that most of the public school sites selected under the original 1986 Board of Education plan were no more than one City block from the private school and cites to ¶ 22 of the June 3, 1986 affidavit of Joseph Saccente (annexed to the Geller Decl. as Exhibit "A") in support of that assertion. The Saccente affidavit does not state that most of the offered public school sites were less than a block from the private school, and my own recollection is that most of the offered public school sites were more distant. Indeed, documents provided to plaintiffs' counsel in discovery in the related case of

Committee for Public Education and Religious Liberty, et al. v. Secretary, United States Department of Education, et al., 88 Civ. 96 (JG), also pending before this Court, show that of the public school sites utilized for Chapter 1 services, only about 5% of the public school sites were less than a block from the private school, another 5% were one block from the private school, and 90% were further, with most being 1/4 to 3/4 of a mile away from the private school.

Conclusion

27. For foregoing reasons, it is respectfully requested that the defendant Chancellor's motion for relief from the judgment be granted.

Dated: Brooklyn, New York
January 19, 1996

[Margaret O. Weiss]
MARGARET O. WEISS

BOARD OF EDUCATION
OF THE CITY OF NEW YORK
110 Livingston Street
Brooklyn, NY 11201

Steven Schwager
Chief School Business Executive

April 28, 1988

Mr. Roger D. Liwer, Director of Audits
Office of the Comptroller
161 Williams Street
New York, New York 10038

Dear Mr. Liwer:

We are deeply disturbed by your recent letter on the Contracting of Mobile Instruction Units (MIUs). Your staff, in the form of three different audit teams, has spent almost 18 months examining this contract. Yet, in spite of hundreds of hours of meetings with the Board and Contractor officials, detailed and tine-consuming testing and analysis of the vehicle, the report is replete with errors and inconsistencies. For example, your letter indicates that the costs to lease MIUs in seven other jurisdictions is between $10,000 and $20,000. These comparisons are irrelevant and ridiculously low when one considers that the cost of a unionized driver with fringe benefits in Now York City is in excess of $30,000. Further, five of the seven lease prices

cited in your letter for comparison purposes are incorrect when compared with the school districts actual leases. In addition, the individual school district leases generally cover the vehicle only. The school district absorbs the other costs as part of its operating budget. Your staff failed to indicate this in the document provided.

Our discussion with officials in six of the seven jurisdictions disclosed that: in several of the cities, vehicles are frequently left unattended due to driver delay in picking up or dropping off the vehicle when a teacher is not present; reports of vandalism and of an incident wherein a teacher's pocketbook was stolen while teaching class have been made; and the generators were made for general use in recreational vehicles only and tend to break down with extended use in MIU's, resulting in a serious loss of class instruction time.

The report also fails to place the issue in context and neglects to account for the unique instructional setting we required for the program. Each of the MIUs was designed to house two groups of students simultaneously; one group of ten receiving remedial instruction in Reading, Math and English As a Second Language, the other, a smaller group receiving guidance services. None of the other jurisdictions cited in your study have such dual purpose vehicles. If we had f ailed to do this, we would have needed 140 vehicles rather than the 70 we contracted for.

Finally, both the RFB format and contents has been debated in various forums including the courts and the Commissioner of Education. Each has found that the specifications were clear and provided procedures for bidders to have their questions answered and to submit alternatives. Despite these independent rulings. Your office, without adequate explanation, still claims the specifications were

unclear.

Your comments about not renewing the contract for the next school year are not based on the actual terms of the contract. Our Office of Legal Services is convinced that the initial term of this contract is f our years and ten months or until June 30, 1991. After that the contract can be extended or terminated an a year-by-year basis until June 30, 1996. Consequently, your recommendation cannot be accepted.

Even if we could follow your suggestion (which our lawyers believe is illegal), the short time available between now and the opening of school would make it impossible to achieve delivery of a new fleet of vehicles. I would also like to point out that your comments an alternative suppliers are misleading. Each of the vendors you claim as capable of delivering MIU's can only produce vehicles half of our required size and do not want to enter into fully loaded leases. They indicated that they can supply vehicles but do not want to provide drivers, maintenance, insurance, etc.

I have attached our detailed comments to each of the matters raised in the report. After you have had an opportunity to review them, I would like another meeting if you still intend to issue a draft report.

Very truly yours,

[Steven Schwager]
Steven Schwager
Chief School Business Executive

SS:sb

History and Present Context

The Board of Education had been providing Chapter 1 services to over 250 non-public schools for over 20 years. The method of service delivery was to send our teachers into a designated classroom in the non-public school. In 1985, the U.S. Supreme Court issued a decision in the Aguilar vs. Felton case which stated that public employees were no longer permitted to enter the non-public schools in order to provide instruction. at the request of the Board of Education and the non-public schools, the courts delayed implementation of the ruling until September 1986.

The Board of Education, in consultation with the Corporation Counsel and the Committee of Non-Public School Officials, began meeting on a regular basis to develop an implementation plan.

Many alternatives were considered, including:

- leasing neutral sites
- leasing vacant apartments
- purchasing a portion of the non-public school
- mobile classrooms
- stationary classrooms
- use of available public school space
- after school hours and weekend programs

Of these, based on the advice of Corporation Counsel, the

Board elected to adopt the following programs for school year 1986-87.

1. Non-public school children would be serviced in available public school sites.

2. If the nearest public school was more than 10 minutes away, or had no room, an MIU would be assigned.

As your study specifically examines the MIUs, I will address the circumstances surrounding their acquisition.

- From October 1985 to January 1986, staff at the Board of Education contacted other jurisdictions using MIU's to determine their proposed implementation of the Aguilar vs. Felton decision. Where they indicated that they employed or planned to employ an MIU-type vehicle, we inquired as to their particular design and operational problems. In addition, numerous meetings were held with the Buildings and Fire Departments to ensure that their concerns would be addressed in our planning stages. In January 1986, based on our educational needs, three designs were prepared and submitted to the Committee on Non-Public Schools for review and comment. Simultaneously, a draft request for bid was sent to over 600 potential vendors throughout the country, asking for their review and comments.

- A pre-bid conference was held on February 18, 1986 and eighteen (18) prospective

vendors attended. Based on the comments received, changes were made in the bid document which included the specification of only one design.

- On March 26th, the proposed bid was advertised in the City Record.

- On March 27th, the Request For Bid was mailed out to prospective bidders.

- On April 2nd, two amendments were issued and sent certified mail to the prospective bidders.

- On April 14th, the bids were opened and seven bids were received.

- Within the next several weeks, the contracts were awarded.

- Four months later, the winning vendor had built 70 units designed to meet our unique educational needs and delivered them in time for the opening of school in September 1986.

The larger area in the MIU is used by the instructional staff to provide remedial reading, mathematics and English As A Second Language services to groups of B-10 students. In the smaller area, clinical and guidance support services (i.e., guidance counselors, social workers, psychologists) are provided to students enrolled in the instructional programs. Students are seen individually or in groups of two-three students.

Currently, the smaller instructions area is being utilized 61% of the time for clinical and guidance services and for the provision of English As A Second Language classes to kindergarten and first grade children. When this area is not being used by the clinical/ guidance or English As a Second Language staff, it is utilized in the following manner:

- During preparation periods, staff completes mandated reports such as testing results, attendance data and progress reports which are distributed to parents of participating students.

- Staff conducts inter-component meetings in order to discuss and evaluate the progress of students enrolled in more than one Chapter 1 program.

- Central supervisory staff conducts on-site conferences with Chapter 1 staff.

- Staff conducts conferences with parents and nonpublic school personnel.

It is important to note that clinical and guidance services are considered important elements of the Chapter 1 program provided to eligible students attending nonpublic schools. Therefore, nonpublic school administrators have exercised the option of spending a portion of their allocation on these support services. In order to provide these services, it was necessary to purchase oversized vehicles. Therefore, any vehicle purchased must have met our needs and not simply been acquired because it seemed an inexpensive or expedient alternative. To date, these 70 vehicles have provided over two million student days of instruction without a breakdown

or major operational problem whereas several of the other jurisdictions cited in your report indicated serious operational problems with their MIUs.

RFP vs. RFB

Your letter contains a number of comments concerning the appropriateness of utilizing the RFP as oppored [sic] to an RFB approach. Standard government purchasing practices generally defines these two approaches as follows:

Request for Proposal (RFP) mandates the use of the RFP process for professional and consulting services for the sole purpose of securing the service at an equitable price.

The RFP format is utilized only in those instances where the acquisition of professional and consulting services are required which cannot appropriately be made principally on the basis of price, or where the nature of the professional and consulting service does not lend itself to the preparation of a complete, adequate and realistic specification or purchase description.

Section 103 of the General Municipal Law exempts contracts involving professional services from competitive bidding (RFB's). As a result, the Board of Education, in its SOPM

Request for Bid (RFB)

The RFB format is employed for the acquisition of items which are capable of being completely described through the use of a comprehensive, highly technically defined, specific description in which the selection of the successful bidder can be made principally on the basis of price.

Section 103 of the General Municipal Law mandates that purchase contracts for tangible goods in excess of $15,000 be let only as the result of formal competitive bidding procedures.

The acquisition was correctly conducted in the RFB mode as MIU's are manufactured items, capable of being specified through a finite, highly detailed description, thereby allowing award of contract to be based on price in the presence of specification compliance. The bidding process adhered strictly to the RFB format in which the ability to accept equivalent products not only occurs regularly, out is legally required to be stated as well as evaluated, if offered by an apparent low bidder.

In June, 1987, the Commissioner of the State Education

Department reviewed this award of contract pursuant to an appeal petition by M.A.J. School Bus, Inc. This decision referred to the case history surrounding equivalencies:

> ...it has long been the law that school districts are required to permit bid proposals to allow for the use of equivalencies. (Matter of A-E Architectural Materials, Inc., 17 Ed Dept. Rep. 146, judgement granted dsmg. pet. to review, sub nom Buck Construction Corp. V. Arback et al., Sup. Ct., Albany County, Sp. TM., CONWAY, J., Jan. 13, 1978, n.o.r.; Fonseca v. Board of Education of Rome City School District, 58 Misc. 2d 223; Matter of Hotaling, 75 State Dept. Reports 97). A bid proposal which did not allow or provide for the ability to use equivalent equipment or materials has been held to be improper on the ground that it would preclude the type of competition envisioned by the provisions of Article 5-A of the General Municipal Law relating to public contracts (Fonseca, supra).

The submission of a sample or prototype was unsuccessfully imposed in this case to ensure that the product offered was in substantial compliance with the specification. This is an acceptable and prudent bidding practice.

The petitioner's appeal also contained an allegation that the Board's old specifications "... were either ambiguous or so indefinite that they did not constitute reasonably definite specifications for competitive bids." However, after review, the Commissioner found that:

> ... based upon the record before me, ...the bid specifications clearly conveyed the intent of respondent board as to the structure, design and

> requirements of the Mobile Instructional Unit to be furnished. Any variation in a proposal submitted by a bidder had to be the equivalent of the specifications and shop drawings set forth in the bid proposal and specifications. Contrary to petitioner's argument, the bid specifications were not so ambiguous or amorphous as to deprive a prospective bidder of the knowledge as to what he was expected to submit in seeking an award of the contract.

Further, the Commissioner noted that "...the bid proposal and specifications provided a means for the resolution of any ambiguity." The "... petitioner failed to make any inquiry even though it now contends that the bid specifications were so ambiguous that it could not discern what type of substitution or equivalencies would be permissible. In view of the availability of a means of resolving any questions it may have had about the specifications, I find no merit to petitioner's argument."

The appeal was denied.

Your report raises the rejection of Bernard Montgomery Co. as an issue. The bid documents required the submission of shop drawings and identification of the manufacturer. We rejected Bernard Montgomery's bid based on their letter of April 11, 1986, which indicated that they did not have a manufacturer available to produce the shop drawings on the vehicle. In addition, they were unable to identify a manufacturer capable of constructing and delivering a vehicle in a timely manner. The Comptroller concludes that we could have saved $1.25 million over 5 years if Bernard Montgomery had been awarded the contract. Unfortunately, there was no way to determine that Bernard Montgomery could have delivered the vehicle, especially since they could

not name a manufacturer. Absent such assurance, and given the time constraints, the prudent course was to deal with a more responsible vendor in order to insure that our programs would begin as scheduled and that no child would be deprived of remedial instruction.

When reviewed in its proper context, it is obvious that the RFB mechanism utilized to contract for the MIUs enabled the Board to have maximum latitude in determining required quantities, obtain the optimum design for instructional needs, and minimize the time expended in the procurement process. The relief remedies provided, to dissatisfied potential bidders within the bid document as well as the various legal options available after the fact, support the Board's decision not to RFP.

I will now address the substantive disputes between the actual facts and your interpretation of the Board's actions.

Contradiction of Design

First, your observation that there appeared to be inherent contradictions in the design of the MIU are incorrect. A custom design was required to meet the particular needs of the Chapter 1 program for New York City within the context of the regulations and requirements of the agencies having jurisdiction.

As I have already discussed, a separate guidance area was required in the vehicle. A generator was specified to provide electrical power to the MIU to preclude any physical connection or modification to the served school in accordance with Federal guidelines.

Stationary units were never considered and there was no

confusion about this issue. Federal regulations permitted Chapter 1 services to be provided only on neutral sites or in MIUs. The only option was whether units would be parked in the street or on the school property. The Department of Buildings stated that if the MIUs were to be parked off-street, on school property, they would be subject to the Jurisdiction of that agency and should be made to comply with the Building Code (see Appendix I, Dennis/ Chiljean/letter dated Dec. 18, 1985). This inclusion of building Code requirements in the specifications were therefore warranted and necessary.

Our consideration of the RV-type van (precisely what you are recommending as a more cost-effective alternative) was halted when, in our preliminary investigations of available vehicle-classrooms, we received a November 1985 memorandum from the New York City Fire Department (see Appendix II) which stated:

> .... that although the fire incidence rate for mobile homes is approximately the same as for conventional dwelling, the injury, life hazard and property loss is three to five times greater. While most fires in conventional dwellings are initially localized and small in size, the design characteristics inherent in mobile homes, such as fire load density, room geometry and combustible finishes provide the potential for rapid flame development, with resulting higher temperatures and smoke and toxic gas generation, in a relatively short period of time. The addition of approximately sixty (60) gallons of fuel carried in this vehicle will only exacerbate conditions.

The Fire Department also provided the Board of Education

with requirements for MIUs, including a sprinkler system, which were included in the specifications (see Appendix III Rice/Bruno/memo dated Dec. 16, 1985). The vendor was to prevent freezing in the sprinkler system. The sprinkler requirement was deleted after further safety systems proposed by New York Bus and Daily Bus were deemed acceptable. Three exit doors were provided in the design to ensure adequate egress as per the Fire Department requirements. Further, New York State Education and Vehicle regulations were included due to the unique nature of a MIU.

Simply stated, ready-made vehicles did not meet our needs or requirements as highlighted above.

Safety Problems

In response to the specific safety issues in the audit, please note the following:

1. Insulation

Foam-in-place urethane was specified because of its high efficiency as thermal insulation. Within the limited thickness required by the shell of the MIU.

Prior to the use of the MIUs, a sample of the actual insulation was examined as tested by National Testing Laboratories to ascertain any potential hazard. The sample was identified as polyurethane foam and was found to char but not ignite or support combustion which would preclude the release of toxic gases (report attached).

Nyack, Syracuse, Rochester and Buffalo (your

specific examples) all use vehicles which have foam insulation.

Specifications for vehicles with similar instructional uses in other jurisdictions i.e., MediCoach Co. and Oklahoma City schools' Title I vehicles, also indicate foam-in-place urethane insulation.

2. Wheelhousing

To date, over 12,000 Chapter 1 students have received services in mobile Instructional Units and there have been no reported accidents involving injury to students.

3. Extension Steps

Extension steps are locked in place by the driver prior to the MIU being utilized for Chapter 1 services. They remain in that position during the instructional day and are released prior to the MIU's departure. There have been no reported incidents where the extension steps have not been in place.

Each MIU has stepwell covers to enclose the open steps so that students do not fall into the steps while walking around the interior of the vehicles. These stepwell covers have to be raised by the driver/ security guard for the purpose of exiting or entering the vehicle. They can either be secured in an 'up' position or removed entirely. This will have no impediment to egress and would be similar to a regular bus with stepwells at the exit doors.

4. Handrails

Current policy dictates that the MIU driver assist the students when entering and exiting the MIU. The company will, however, be instructed to install the handrails.

Cost Comparison

Our own review of the six cities surveyed by your auditors revealed wide disparities between services received by the New York City Board of Education and those received by the other cities as shown in the following chart:

		Lease Price Includes				
School District	No. of MIU's	Driver's Salary	Insurance	Maintenance	Gas	Storage
Buffalo	5	No	No	No	No	No
East Ramapo	5	Yes (1)	No	No	No	No
Syracuse	6	No	No	No	No	No
Yonkers	5	Yes (1)	No	No	No	Yes
Nyack	1	No	No	No	No	No
Rochester	2	No	No	No	No	No
NYC BOE	70	Yes (2)	Yes	Yes	Yes	Yes

Notes:

(1) Non-Union Drivers
(2) Union Drivers

Our discussion with officials in six of the seven

jurisdictions disclosed that: in several of the cities, vehicles are frequently left unattended due to driver delay in picking up or dropping off the vehicle when a teacher is not present; reports of vandalism and of an incident wherein a teacher's pocketbook was stolen while teaching class have been made; and the generators were made for general use in recreational vehicles only and tend to break down with extended use. This results in substantial lost instruction time. Unlike New York City, no City surveyed required spare vehicles.

Further, based on our review of the actual leases for the vehicles, the prices cited for most of your examples are incorrect. Finally, as discussed earlier, the other vendors provide vehicles half the size we require which would force us to double the number of vehicles in use.

CONCLUSION

Virtually all of the matters raised in this report had previously been considered, reviewed, and/or challenged by Board officials, Corporation Counsel, the Committee on Non-Public Schools, the Courts, the Commissioner of Education, and other investigatory groups. Subsequently, each of these groups found that the Board acted properly in the letting of this contract. After you consider our comments and reflect on them, I am sure you will come to a similar conclusion.

[LETTERHEAD] APPENDIX I

December 18, 1985

CORNELIUS F. DENNIS
Deputy Commissioner
Phone Number

Mr. Roger A. Chiljean
Acting Director
Office of Design & Construction
New York City Board of Education
28-11 Queens Plaza North
Long Island City, New York 11101

Re: Mobile Vans

Dear Mr. Chiljean:

Your letter of October 23rd and accompanying typical specifications for a mobile trainer and two motor vans to be used for teaching purposes has been reviewed by my staff with your liaison office. A copy of a letter from the Fire Department dated November 29th has also been reviewed.

Trailers or motor vans parked and used on the city street are not under the jurisdiction of the Department of Buildings. Trailers and vans used for school purposes on school property are subject to the jurisdiction of this department and should be made to comply with Tables 3-4 and 4-1 of the Building Code. These tables relate to construction classifications with particular reference to fire ratings. In discussion with your liaison office, I have been advised that the smaller motorized unit would most probably be used since the need is for a unit to service up to twelve people for three to four hours on one site. This unit is metal frame

however the inner finish is wood with styrofoam insulation. An attempt should be made to secure a unit with non-combustible insulation in lieu of styrofoam. The finished material, wood or plastic, should be selected with care, as to their flamability [sic] characteristics.

I believe that with suitable care and some degree of fire alarm-smoke detector installation along with appropriate siting of the vehicle on the school yard this department would be able to approve the use of either a mobile trailer or a motor van for use as a portable classroom for up to twelve students.

Very truly yours,

[Cornelius F. Dennis]
Cornelius F. Dennis, P.E.
Deputy Commissioner

APPENDIX II

[FIRE DEPARTMENT LETTERHEAD]

November 29, 1985

Roger A. Chiljean
Acting Director
Office of Design and Construction
New York City Board of Education
28-11 Queens Plaza North
Long Island City, New York 11101

Dear Mr. Chiljean:

Your letter to Commissioner Joseph Spinnato, in which you propose utilization of mobile vans for teaching purposes, has been referred to me for response.

While this Department, at this time, has not regulations governing this specific type occupancy or use, we do insist that all current life safety, fire protection and construction requirements relating to schools be adhered to.

Our apprehension concerning your proposal is based on the fact that although the fire incidence rate for mobile homes is approximately the same as for conventional dwelling, the injury, life hazard and property loss is three to five times greater. While most fires in conventional dwellings are initially localized and small in size, the design characteristics inherent in mobile homes, such as fire load density, room geometry and combustible finishes provide the potential for rapid flame development, with resulting higher temperatures and smoke and toxic gas generation, in a relative short period of time. The addition of approximately sixty (60)

galls of fuel carried in this vehicle will only exacerbate conditions.

Thank you for your interest in fire safety.

Very truly yours,

Anthony W. DeVita, D.A.C.
Exec. Asst. to Chief of Dept.

AWD:RMM

APPENDIX III

[FIRE DEPARTMENT LETTERHEAD]

December 16, 1985

TO: Joseph F. Bruzo — 1st Deputy Fire Commissioner

FROM: William D. Rice — Lieutenant. Public Buildings Unit

SUBJECT: Minutes of Meeting Conducted on December 12, 1985 to discuss Board of Education's proposed Utilization of Mobile Homes for educational use. This meeting was convened by the New York City Corporation Council.

MEETING

1] Place: Fire Department Headquarters, 8th Floor, Chief of Department's Conference Room

2] Attendees: Attendance sheet attached.

3] Purpose: Board of Education proposed to use self propelled mobile homes as Classroom to provide remedial education fat those children currently enrolled in the private/ parochial educational system as required by law. This meeting was called to discuss this Department's objections to this proposal and solicit from the Fire Department what Life Safety and Fire

Protection system would be required to allow these vehicles to be utilized In the fashion so desired by the board of Education.

4] Fire Department Recommendations:

This Department recommended these vehicles comply with the following prior to any consideration of their intended use:

a] New York City Department of Buildings approval to be obtained for such use. This approval is to contain maximum occupancy load for classroom use as is required by code.

b] Sprinkler system be installed with adequate water supply and approved by this Department.

c] At least 2 exits, remote from each other be provided. In addition, each exit door is to be equipped with panic type hardware and open in the direction of egress.

d] Smoke detectors are to be provided throughout, especially in cockloft area.

e] Flaw spread, smoke spread and toxicity ratings of all interior finishes, furnishings and floor coverings are to be in compliance with New York City Buildings Code for "C" (school) type occupancies.

f] As required by code, interior fire alarm is to

be installed and be capable of transmitting an alarm to parent school which in turn shall notify the Fire Department. There shall be no pre-signal device, in so far as fire alarms are concerned, installed.

g] There shall be a communication system installed capable of direct/dedicated communication between vehicle and parent school.

h] Site selected for vehicle placement, outside of parent school be accessible to Fire Department apparatus and approved by this Department.

i] Exterior of vehicle be distinctively marked so as to make it easily identified.

j] Vehicle exhaust system be designed so to prohibit toxic fumes from entering into same.

k] Fire drill and evacuation plans be prepared for each vehicle and submitted to this Department for approval.

Conclusion:

It is the opinion of all Fire Department members present at this meeting that unless all Fire Department recommendations are incorporated in any proposal to utilize these vehicles for educational purposes this Department strongly object to this type usage.

Respectfully submitted,

[William D. Rice]
William D. Rice
Lieutenant, Public Buildings Unit

WDR:mm

cc: Chief Jos. M. DeMeo
Chief Wm. Manny, Jr.

APPENDIX IV

[NATIONAL TESTING LABORATORIES, INC.
LETTERHEAD]

BOARD OF EDUCATION
28-11 BRIDGE PLAZA NORTH
LONG ISLAND CITY, N.Y. 11101

EXAMINATION OF FOAM INSULATION

SAMPLE MARKINGS: MOBILE INSTRUCTIONAL UNIT, NY BUS SERVICE

THE ABOVE SAMPLE OF FOAM INSULATION WAS SUBMITTED FOR IDENTIFICATION AND COMBUSTIBILITY.

OUR EXAMINATION REVEALED THAT THE MATERIAL WAS POLYURETHANE FOAM.

A FLAMMABILITY TEST INDICATED THAT THIS MATERIAL WILL CHAR BUT WILL NOT IGNITE OR SUPPORT COMBUSTION.

THE LACK OF COMBUSTION WILL PRECLUDE THE RELEASE OF ANY TOXIC GASES.

NATIONAL TESTING LABORATORIES,INC.

F. KONSTANDT
TECHNICAL DIRECTOR

30 AUG.1986
REF. 20699

[BOARD OF EDUCATION LETTERHEAD]

MEMORANDUM

APRIL 29, 1988

TO: MEMBERS OF THE BOARD OF EDUCATION

FROM: RICHARD A. GREEN

RE: Comptroller's Letter Dated April 26, 1988 Concerning the Contract for Mobile Instructional Units

---

Attached please find a letter dated April 26, 1988 from the Office of the City Comptroller concerning the Board of Education's contract for mobile instructional units.

In addition, I have attached our response dated April 28, 1988 which refutes each of the comments made.

I have also summarized both letters for ease of review.

I request this item be placed on the agenda for the May 3, 1988 meeting.

RRG:mc

cc: J. Nolan
M. Tucker
J. Shenker
S. Ladner
B. Williams
J. Posman
S. Schwager
K. Standard
R. Terte

Analysis of Comptroller's Letter

	Comptroller States		B. of E. Response
1.	Contract should not be renewed for 88-89 school year.	1.	Initial contract term is 4 years and 10 months. No renewal provision until 1991.
2.	At the outset Board did not decided whether it needed a stationary trailer unit or mobile unit.	2.	Board determined at the initial stages it wanted a mobile unit. The Board also determined that it wanted a vehicle with two (2) components in order to meet our unique educational standards. The issue was where to park it - on the street or non-public school property.
3.	Board did not acquire standard vehicle. It specified a custom vehicle.	3.	Fire Department and Building Department safety requirements precluded a "standard" vehicle. See Appendix II of our response concerning mobile homes.

4.	Board should not have provided an or-equal clause in the bid documents, should have used a request for proposal instead of a bid, should not have made this procurement on a requirement contract basis and should not have required a prototype.	4.	The State Commissioner of Education in an action against the Board by a losing MIU bidder has ruled that our method of procurement was proper and that an or-equal clause was legally required.
5.	Board rejected a bid from Bernard Montgomery because they failed to submit required shop drawings.	5.	This matter was discussed with the Board at the meeting when contract was ratified. Bernard Montgomery failed to submit shop drawings because it did not have a manufacturer to produce the vehicle.
6.	NY Bus vehicle is unsafe:	6.	
a)	Polyurethane foam used in vehicle emits a toxic gas when it burns.	a)	Laboratory tests performed by our lab (See appendix IV of our response)

			indicate this is not true. Further "standard" MIU's proposed by Comptroller have styrofoam insulation which the building department specifically stataed [sic] should not be used (See Appendix I).
b)	Protruding wheel housing in the aisle is a safety hazard.	b)	Over 12,000 children have used our MIU's for over 200 days without a single reported accident.
c)	Exterior steps lack a handrail and a step well cover must be manually removed.	c)	Contract will be directed to install handrail; step well cover will be modified or removed.

7.	Cost of "standard" MIU's used in other jurisdictions are much cheaper than our custom MIU's.	7.	Comptroller is comparing apples and oranges. MIU's in other jurisdictions are standard vehicles which do not meet N.Y.C. building and fire codes. Leases are for the vehicle only. No mention is made of other costs, such as gasoline, insurance, maintenance, garage, storage, and the driver in Comptroller's figures.
8.	Comptroller states other supplies can deliver new MIU's for September.	8.	Our contacts with cited vendors indicate that they can supply "standard" vehicles for September. The vehicles are generally half the size required. The vendors do not want to provide drivers, insurance, maintenance, etc.

[BOARD OF EDUCATION LETTERHEAD]

Steven Schwager
Chief School Business Executive

March 26, 1987

The Honorable Robert Eshard
Deputy Mayor
Office of The Mayor
City Hall
New York, New York 10007

Dear Mr. Eshard:

As part of its plan to comply with Federal Law while providing Chapter 1 services to non-public school pupils, the Board of Education will soon bid contracts to place Stationary Instruction Units (S.I.U.'s) on parochial school property, a portion of which is to be leased by the Board.

Sub-Section 854(d) of the New York City Charter states that "Municipal Art Commissions approval is not required for any building or other structure which has a total estimated cost of less than 4250,000.00, if the Mayor or the City Counsel requests, in writing, that the Commission not act".

I ask that the Mayor make such a request, on behalf of the Board, based on the estimated cost and nature of these units, as detailed below:

1. A Stationary Instruction Unit is a modified

trailer module with metal skin, 12'-0" x 60'-0". It contains two small classrooms, for ten pupils each, and two small counseling areas; pupils will occupy it for 45-minute periods.

2. It will be supported by jacks resting directly on pavement or on concrete footings, if required.

3. Each S.I.U. will cost approximately $100,000. Site development is restricted (by Law) the minimum necessary to place a S.I.U., demark the leased area, obtain electric power and permit safe operation of the unit.

It has not yet been determined whether the S.I.U.'s will be leased or purchased by the Board of Education.

If you need any additional information about the S.I.U. Program, please let me know.

Thank you for your consideration.

Sincerely,

[Steven Schwager]
Steven Schwager
Chief School Business Executive

SS:tg

cc: J. Saccente
M. Sinansky
Min Schwartz

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINES, and BELINDA WILLIAMS,

Defendant-Intervenors.

STIPULATION AND ORDER ALLOWING INTERVENTION AND ADDING A DEFENDANT

78 CV-1750 (JG)

WHEREAS, parents of children who attend private schools in New York City and who receive benefits under

the provisions of Chapters 1 and 2 of the Education Consolidation and Improvement Act of 1981, as amended, which has been challenged in this action, desire to intervene as defendants in this case to protect the interests of their children; and

WHEREAS, in 1978, Yolanda Aguilar, Lillian Colon, Miriam Martines and Belinda Williams, parents of children who attended Roman Catholic elementary schools in Brooklyn and the Bronx, were defendant-intervenors in the above-captioned case; and

WHEREAS, the aforesaid defendant-intervenors no longer have a cognizable interest in this litigation; and

WHEREAS, the following persons are parents of children who attend Roman Catholic elementary schools in the City of New York and who now desire to intervene as defendants to protect the interests of their children in receiving Chapter 1 and Chapter 2 benefits hereafter:

a. Rachel Agostini, who lives in Brooklyn, New York, is the parent of Kenneth, a first-grade student at St. Nicholas Elementary School who benefits from the Chapter 1 and 2 programs;

b. Maria Cosarca, who lives in Brooklyn, New York, is the parent of Diana and Veronica, first- and fourth-grade students at St. Nicholas Elementary School who benefit from the Chapter 1 and 2 programs;

c. Digna Duran, who lives in Brooklyn, New York, is the parent of Henry Gomez, a second-grade student at St. Nicholas Elementary School who benefits from the Chapter 1 and 2 programs;

d. Ivette Encarnacion, who lives in Brooklyn, New York, is the parent of Shana, a second-grade student at St. Nicholas Elementary School who benefits from the

Chapter 1 and 2 programs;

e. Maria L. Fernandez, who lives in Ridgewood, New York, is the parent of Myrelis E. Guzman, a third-grade student at St. Nicholas Elementary School who benefits from the Chapter 1 and 2 programs;

f. Dolly Cutrera Then and Joseph M. Then, who live in Brooklyn, New York, are the parents of Stephanie, a first-grade student at St. Nicholas Elementary School who benefits from the Chapter 1 and 2 programs;

g. Margaret Figueroa, who lives in Brooklyn, New York, is the parent of La Risa, a fifth-grade student at St. Francis Xavier School who benefits from the Chapter 1 and 2 programs;

h. Michele Gallo, who lives in Brooklyn, New York, is the parent of Lauren Ann, a fourth-grade student at St. Francis Xavier School who benefits from the Chapter 1 and 2 programs;

i. Marie Sejour, who lives in Brooklyn, New York, is the parent of Shantique and Shande, second- and third-grade students at St. Francis Xavier School who benefit from the Chapter 1 and 2 programs;

j. Joan Jackson, who lives in Brooklyn, New York, is the parent of Tyrone, a fifth-grade student at St. John the Baptist School who benefits from the Chapter 1 and 2 programs;

k. Cheryl Malcousu, who lives in Brooklyn, New York, is the parent of Alicia, a fourth-grade student at St. John the Baptist School who benefits from the Chapter 1 and 2 programs;

l. Tonya Stevens, who lives in Brooklyn, New York, is the parent of Saiquan, an eighth-grade student at St. John the Baptist School who benefits from the Chapter 1 and 2 programs; and

m. Rosemarie Vasquez, who lives in Brooklyn, New York, is the parent of Nicholas Zarzuela, a second-

grade student at St. John the Baptist School who benefits from the Chapter 1 and 2 programs; and

WHEREAS, the fourteen parents mentioned in the preceding paragraphs a. through m. are represented by the law firm of Williams & Connolly, 725 12th Street, N.W., Washington, D.C. 20005 (by Kevin T. Baine);

WHEREAS, the fourteen parents mentioned in the preceding paragraphs a. through m. have a strong interest in this litigation that is not necessarily shared by the other parties to this action;

AND WHEREAS, the Chancellor of the Board of Education of the City of New York is a defendant in this action and the Board of Education of the City School District of the City of New York ("the Board of Education") is the educational policy-setting body and is the Local Educational Agency for the Chapter 1 program in New York City;

WHEREAS, the Board of Education should be a party-defendant under Rule 20(a) of the Federal Rules of Civil Procedure, as an entity against whom there is asserted a right to relief arising out of an occurrence common to all defendants and because there are raised questions of law and fact common to all defendants in this action;

WHEREAS, the Board of Education is represented by the Corporation Counsel of the City of New York, Paul Crotty, 100 Church Street, New York, NY 10007, which is also counsel to the Chancellor of the Board of Education of the City of New York;

IT IS HEREBY STIPULATED AND AGREED by the undersigned counsel for the parties to this action that:

1. The fourteen parents named in paragraphs a. through m. above shall be permitted to intervene as defendants in this case pursuant to the provisions of Rule 24 of the Federal Rules of Civil Procedure.

2. Yolanda Aguilar, Lillian Colon, Miriam Martines, and Belinda Williams shall be permitted to withdraw as defendant-intervenors.

3. The Board of Education of the City School District of the City of New York shall be added as a party defendant pursuant to the provisions of Rule 20(a) of the Federal Rules of Civil Procedure.

4. The caption of this case shall be amended as in the attachment to this Stipulation as Exhibit A.

Dated: December 19, 1995

Respectfully submitted,

[Stanley Geller ktb]
STANLEY GELLER (SG 2876)
750 Lexington Avenue
New York, NY 10022
(212) 486-4590

ATTORNEY FOR PLAINTIFFS

PAUL A. CROTTY
Corporation Counsel

By [Marilyn Richter ktb]
MARILYN RICHTER (MR 8476)
Assistant Corporation Counsel
100 Church Street, Room 6-C-34
New York, NY 10007
(212) 788-0931

ATTORNEYS FOR CHANCELLOR AND BOARD OF EDUCATION OF THE CITY OF NEW YORK

[W. Scott Simpson ktb]
W. SCOTT SIMPSON (WS 4406)
Federal Programs Branch
Civil Division - Room 986
U.S. Department of Justice
Post Office Box 883
Washington, DC 20044
(202) 514-3495

ATTORNEY FOR THE UNITED STATES SECRETARY OF EDUCATION

[Kevin T. Baine]
KEVIN T. BAINE (KB 0710)
Williams & Connolly
725 12th Street, N.W.
Washington, DC 20005
(202)434-5000

[Richard E. Donovan ktb]
RICHARD E. DONOVAN (RD 4388)
Kelley Drye & Warren
101 Park Avenue

New York, NY 10178
(212) 808-7800

ATTORNEYS FOR DEFENDANT-INTERVENORS JUAN COLON, et al. and RACHEL AGOSTINI, et al.

IT IS SO ORDERED ON THIS
6th DAY OF MAY, 1996
[John Gleeson]
United States District Judge

Appendix A

Kevin T. Baine (KB 0710)
Kevin M. Downey (KD 7356)
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, DC 20005
(202) 434-5010

Richard E. Donovan (RD 4388)
KELLEY DRYE & WARREN
101 Park Avenue
New York, NY 10178
(212) 808-7800

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

78 CV-1750 (JG)

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and THE BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants.

-and-

RACHEL AGOSTINI, et al.

Defendant-Intervenors.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

BETTY LOUISE FELTON, et al, CV 78-1750

Plaintiffs,

-against- : United States Courthouse Brooklyn, New York

DEPARTMENT OF EDUCATION, et al,

Defendants. :

May 9, 1996
- x 2:00 o'clock p.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: STANLEY GELLER, ESQ.

For the Defendant: NEW YORK CITY LAW DEPARTMENT
100 Church Street
New York, N.Y. 10007
BY: MARILYN RICHTER
and PETER D.

WINEBRAKE
Assistant Corporation Counsel

WILLIAMS & CONNOLLY
725 Twelfth Street N.W.
Washington, D.C. 20005
BY: KEVIN T. BAINE, ESQ. and EMMET T. FLOOD, ESQ.

UNITED STATES DEPARTMENT OF JUSTICE
901 E. Street, N.W.
Washington, D. C. 20530
BY: W. SCOTT SIMPSON, Assistant U.S. Attorney

Court Reporter: Henry R. Shapiro
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by computer.

THE CLERK: Civil cause for motion. Felton versus Department of Education, et al, docket number CV 78-1850.

THE COURT: Please be seated.

State your appearances for the record.

MR. GELLER: Stanley Geller for the plaintiff.

MR. WINEBAKE: Peter Winebake and Marilyn Richter for the Chancellor and the City Board of Education.

MR. SIMPSON: Scott Simpson for the Secretary.

MR. BAINE: Kevin Baine for the intervenors Agostini, et al.

THE COURT: Sorry to keep you waiting. Do you want to be heard on your motion?

MR. WINEBAKE: Yes, your Honor.

I'm Assistant Corporation Counsel Peter Winebake. I'm here on behalf of the Chancellor of the City School District and the New York City Board of Education in support of our motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, seeking relief from Judge Neaher's 1985 order.

As Your Honor is aware, that order enjoined the city's school system from placing public school employees in parochial and other religious schools for purposes of giving instruction pursuant to the Chapter One program.

Your Honor, the reason that we made this motion, and it was made pursuant to the resolution passed by the Board of Education, they requested us to make a motion. The reason we're doing it, Your Honor, is because compliance with Judge Neaher's 1985 injunction, as I presume the Court is aware, has created extraordinary

financial burden on the City of New York and on the youngsters who attend school in the City of New York.

And, Your Honor, it's also put us in a situation wherein complying with the order, we've been forced to instruct youngsters who attend the parochial schools in a manner which is academically inferior to hands-on instruction by teachers in parochial school classrooms. Instead we've had to go forward with a hodgepodge of alternatives, such as the mobile instructional units, the use of leased space, the use of public schools.

And all of that has been presented to Your Honor in Ms. Weiss' affidavit, and I won't go into the burdens of the present system unless the Court would so desire.

THE COURT: Whatever you want to argue.

Let me make it easier for you. You really think I can help you out with the relief ordered by Judge Neaher without running right into the Supreme Court's decision on school education in the parochial schools?

You are not seriously asking me to just decide that issue on my own contrary to what the Supreme Court has decided, are you?

MR. WINEBRAKE: We're not asking you to directly overrule the Supreme Court. We understand that would be improper.

We also understand, Your Honor, that this is an extremely unique and unusual situation.

THE COURT: Why?

MR. WINEBRAKE: In a sense our hands are tied procedurally, and I will tell you why. This is an extraordinary situation because we're seeking relief from Judge Neaher's order. And we concede that Judge Neaher's order is the -- is entirely based on the Supreme Court's decision in Agular [sic].

If we were any other school district in the nation, Your Honor, based on the recent establishment clause in jurisprudence, I believe we'd be able to put public school teachers in a parochial classroom.

Unfortunately, Your Honor, because we operate under Judge Neaher's injunction, we're not able to create a test case or to create any kind of a lawsuit by doing that. To do so would put us in contempt of court, and obviously that is not a reasonable alternative. So we've been forced--

THE COURT: It's not that unique. Aren't there a lot of situations that people can't go up the ladder and seek appellate review in the absence of placing themselves in contempt, such as an order to testify -- ordering someone to testify despite a claim of privilege?

MR. WINEBRAKE: I think it's unique. We happen to be -- we're in a situation where the Supreme Court, as we've noted -- we believe five justices of the Supreme Court have expressed a desire to overturn a previous Supreme Court decision. We operate under an order that is entirely based upon that same Supreme Court decision.

THE COURT: Here you are. And you are under Rule 60(b), and you hope that you get a vehicle, an order from me from which you can attempt to get the review or the reconsideration that you think five of those justices are

inclined to give this issue, fair enough?

MR. WINEBRAKE: That is correct.

THE COURT: You're not asking me to overrule the Supreme Court.

MR. WINEBRAKE: No, we're not.

THE COURT: You want a procedural device, yes?

Mr. Baine has suggested another procedural device which is a declaration in the other case.

MR. WINEBRAKE: Correct.

THE COURT: For the same purpose, I take it?

MR. WINEBRAKE: We dropped a footnote in your memo saying, if Your Honor felt a declaratory judgment proceeding was the more proper procedural vehicle, that we believe that our instant motion can be converted in a Rule 57 motion.

However, I just want to make it clear to the Court that it would be a lot cleaner if we were another school district, and we could simply put a public school teacher, you know, in one of the parochial schools and then an organization such as Mr. Geller's would sue us and seek an injunction and we'd be on our way.

But because of Judge Neaher's order, because we happen to be the party that was before the Supreme Court in the Agular [sic] case, we're unable to do that. That has kind of created this unique procedure situation.

THE COURT: I suppose the conundrum that you feel you face reflects sort of an appreciable respect for Judge Neaher's order, because I don't think you face it really.

You made this Rule 60(b) motion. I will decide it. It seems to me, though, you and many other litigants in the same situation could have just put a public school teacher in the parochial school, I'm sure Mr. Geller would have been in here in a heartbeat with an order to show cause why you should not be held in contempt.

MR. GELLER: Less than a heartbeat.

THE COURT: You could have sought, I suppose, a stay of any sanction.

In any event, it's a long winded way of saying it reflects some admirable respect for the order of the Court.

Anything further?

MR. WINEBRAKE: I would quickly point out that what we're seeking here within Rule 60, we're seeking relief pursuant to Rule 60(b)(5). What we're essentially saying, Your Honor, is that under the Supreme Court decision in Ruffo [sic] versus Suffolk County Jail, the dissenting opinions in Kyrias Joel [sic] constitutes a significant change in the law under Rule 60(b).

THE COURT: Doesn't that argument sort of by itself defeat itself?

The last time I checked dissent means the people that lost.

MR. WINEBRAKE: The question becomes, Your Honor, whether those dissenting opinions, in light of other recent Supreme Court developments, such as the development in the Zobrest case and the Rosenberger case, you know, constitute a significant change in the law.

We've argued, Your Honor, and we've cited Supreme Court jurisdiction regarding the Supreme Court's willingness to overturn themselves in the proper case when they feel -- when they feel a constitutional issue had been incorrectly decided previously. The Supreme Court has always been willing to overturn themselves in those situations --

THE COURT: You want me to act as though that issue, which wasn't briefed in Kyrias Joel, wasn't briefed in Rosenberger, which the Court, at least two of the five justices on whom you purport to rely, wanted to reconsider, not overrule, you want me to act as though it was briefed and considered and they overruled Agular [sic]? How can I conceivably do that?

MR. WINEBRAKE: We think that is the primary factor for our argument. There has been a significant change in the law.

We also cite the Court, however, to Zobrest a case in which a sign language interpreter was permitted under the establishment clause to enter a parochial school classroom and the Rosenberger case, a Christian publication on a college campus was funded by a public university.

THE COURT: I read them. They both don't purport to overrule Agular [sic].

MR. WINEBRAKE: We concede that Agular [sic]

has not been explicitly overturned. This is mostly a procedure device. However, I do feel compelled to make an argument because I think it's a good faith argument, this is not a purely procedure device.

And I would just like to -- I would like to make the argument under all of the circumstances, and under all the circumstances we believe that this Court would possibly have the discretion to consider the recent jurisprudence and say there has been a significant change in the law here, even though the Supreme Court decision has not been explicitly overturned, that is only because the justices of the Supreme Court haven't been presented with a case in which they felt that they had the record to overturn it.

We believe it's inevitable, in light of everything that is going on, that the case will be overturned. And what we're seeking, Your Honor, is relief pursuant to Rule 60 because we really feel that every year that -- every year that we're forced to operate under this order, it's costing millions and millions of dollars and we seek immediate relief in our papers.

However, as we noted already, this is really the only procedural vehicle that we have to get up to the Second Circuit and eventually hopefully to the Supreme Court.

I would just make one more point, Your Honor. We feel that we also move, pursuant to Rule 60(b)(6) and in so doing we put in an extensive factual record. Because of that we feel that the Supreme Court in the instant matter would have a very adequate factual record upon which to reconsider the Agular [sic] decision. And for that reason, we also think this is an appropriate vehicle to go up on.

We'd ask the Court, if you are inclined to deny the motion, we'd respectfully request that you do so quickly so that we can move on. I thank you for your time.

THE COURT: Yes. Thank you.

MR. BAINE: If you don't mind, I will use the podium because I've never been accused of not speaking up loudly enough.

THE COURT: Keep your voice up.

MR. BAINE: Justice O'Connor said in her concurring opinion in Kiryas Joel, the Supreme Court should be prepared to reconsider Aguilar in a proper case.

It's our position that this is a proper case in which to invite reconsideration of Aguilar. It is the same case.

There are many advantages to seeking reconsideration of Aguilar in this case. There is a completely developed record. A record that was satisfactory to both sides last time, a record that was sufficient for the Supreme Court to resolve the issues.

Indeed ultimately, I believe that the City of New York would have to seek relief from this judgment in order to put teachers back on the premises of the parochial schools, even if the Supreme Court were to say in another case, Aguilar is hereby overruled, I think the City would have to come in here and file another 60(b) motion and ask for relief from the judgment. I think it's an appropriate vehicle, it's the proper case.

The Court has put its finger on the problem.

Obviously to some degree we're here speaking to the Supreme Court. I don't like to be in the position of speaking to a district court and saying, Your Honor, this argument is really addressed to the Supreme Court. I don't feel too badly, in effect, doing that here, because in this case it's the Supreme Court that put us in the predicament in the first place.

Indeed this Court, your predecessor, in our view, did the right thing. And it was the Supreme Court that essentially said the District Court was incorrect in permitting these teachers to go into the parochial schools and offer the services on premises.

Our position is simply this. This is a proper procedural vehicle. We have a substantial basis for arguing that the state of the law today truly is that on premises services do not violate the establishment clause as construed in the most recent cases announced by the Supreme Court.

There are really, I think, two issues before the Court. The first is the Rule 60(b) motion. Is there something procedurally defective about it? And the second question, how should the Court rule on it?

Should it grant or deny the motion, our position is the 60(b) motion is certainly a proper procedural vehicle to raise the issue. It perhaps is the best one.

There is no procedure under the federal rules to go to the Supreme Court and ask them to reconsider a decision. The proper procedure is to ask a District Court for relief first. And if the District Court on the merits denies the application, we can seek to appeal.

THE COURT: Defying the order is an option.

MR. BAINE: That is an option as well.

THE COURT: Takes the vagaries of whether the procedure is sufficient out of the picture, I take it --

MR. BAINE: It certainly does. It wouldn't be my client's decision whether to do that. My clients who are the parents of children accepting the services might --

THE COURT: You would like it just fine since your clients would not be fined or worse.

MR. BAINE: I could urge the City of New York to take that position, but I won't do it publicly if I do it. That is a proper procedural vehicle.

If the courts were to say Rule 60(b) is not available because of the passage of time, or it doesn't meet the criteria, doesn't fall within the ball park, you can't really come in there with a straight face and make the kinds of argument you need to make, it's not a procedure vehicle available to you.

And if the Court were to say that my alternative, request for declaratory judgment for some procedural reason is also defective, then I suspect the only way that the City of New York could seek the reconsideration that five justices have invited would be to put the City in contempt.

THE COURT: Let me ask you this. Is that decision whether Rule 60(b) is that the appropriate vehicle for appellate review? Is that something on which my decision

really has any bearing?

I mean, the question I'll have for Mr. Geller, is arises from his statement in his memorandum, the conclusion that says I shouldn't even entertain the motion. But I will ask Mr. Geller that question directly when he speaks.

But it seems to me there are really, although there are explanations for everything, there are two outcomes to this. One is granted, the other is denied. If it's denied, and in your memorandum you are a little more explicit, then the City defendants are about, the fact that you really can't get the relief you seek from me, and I take no offense at that. You can only get the relief that you seek from the Supreme Court.

If I deny this motion, is there anything about that denial one way or another that would effect whether the circuit or the Supreme Court will review this is procedurally right to revisit Aguilar? Do you understand my question?

MR. BAINE: Yes. I think if the Court were to deny the motion on the ground it was untimely, we'd have a problem. We'd not have a neat legal issue on appeal if the Court were to deny the motion on the ground it is not in timely --

THE COURT: Excuse me. If you are right and your colleague is right about how eager the Supreme Court is to review this, then you can just seek review of my determination that it was untimely, really.

MR. BAINE: Anything is possible in this case.

THE COURT: If you are right about how anxious

they are. Some District Judge's problem, how quickly you found this Rule 60(b).

MR. BAINE: There are all sorts of ways in which an appeal can be derailed by procedural arguments. Even a Justice who thinks this is an issue worthy of consideration might be uncomfortable making a decision if the decision below were on the ground it is untimely, and the technical issue on appeal, whether the Courts below abused their discretion in saying that the motion was untimely, then maybe there is not a nice legal issue. That's why it's posed the alternative.

THE COURT: The issues crop up more in the dissent than they do in the denial of a cert petition. I understand.

MR. BAINE: There is no secret agenda. We're trying to make a proper application that will be entertained on the merits so that the issue is framed and so if the Supreme Court was serious, they will have the opportunity to grant the cert petition. They can deny it if they choose.

That's why I think it's important for the Court to say, if it's so inclined, there is nothing improper about the motion as a procedural motion. It's not too late.

The grounds that are asserted are appropriate grounds, and the grounds asserted are, there has been a change in law, it hasn't reached to the point of explicitly overruling the decision of Aguilar, but there has been a change in establishment clause law that warrants judicial reconsideration of the injunction. Reconsideration by the courts.

That is an appropriate argument to make even if the

Court to, which you are addressing the argument feels constrained to reject it on the merits.

THE COURT: And when did the change in the law -- and I have in mind the timing objection made by Mr. Geller -- when did the change in the law that prompted this 60(b) motion congeal to the point where the clock started running on the amount of time, whatever that is, that you have under Rule 16?

MR. BAINE: It was a gradual process that became clearer and clearer as more cases were decided. But the Kiryas Joel opinion was handed down in June 27, 1994. These motions were made in 1995.

And, so, yes, there was that delay of a year, but that is not undue delay. No one has been prejudiced. There is a serious decision that you have to make and the City of New York sits there and studies that opinion, it requires a board resolution, it requires a lot of serious thinking as to whether or not this is an appropriate thing to do to come back to the court that ordered you not to do something and ask that court for relief on the grounds that the decision that hasn't been explicitly overruled has been sufficiently undermined; this is a substantial motion.

I don't think anybody has been prejudiced by that year delay. So I do think that the motion is timely and I do think that what we're saying, not just to Your Honor, but we're saying to the courts is that this injunction can no longer be squared with controlling legal principles. And that if we're to look at and try to understand the evolution of establishment clause thinking that has gone on in the Supreme Court, the conclusion that compels itself is that there is nothing unconstitutional about sending public

employees who are supervised by public employees into a parochial school for the purposes of instructing children in a secular subject.

What the Supreme Court has said most pertinently is in the Zobrest opinion, when the government offers a neutral service -- no question this is a neutral service -- on the premises of a sectarian school, as part of a general program that is in no way viewed towards religion -- this is a general program -- it follows under prior decisions that provisions of that service does not offend the establishment clause.

There could be no clearer statement of the principle that we think governs this case. Utterly irreconcilable with the decision of the Supreme Court in Aguilar. You cannot square the two of them.

While I cannot say to Your Honor that the Supreme Court has overruled Aguilar, I can say that a majority opinion of the Supreme Court made that statement knowing that they had decided Aguilar. It's not they hadn't thought of a case like Aguilar. They had decided Aguilar. They knew it was on the books. They didn't talk about Aguilar in that opinion, but a majority of justices joined that statement.

THE COURT: What role does the doctrine of the law of the case play in this? Those words are found, I believe, only in your memorandum.

Would it be possible for the argument you make to be properly accepted by some other district court in some other case or maybe every other district court in every other case except this one, since this is Aguilar, and I would have to reject it because of the doctrine of law of the case?

MR. BAINE: I think there is no question that you're in a tougher position than any other court. If we make the motion in person, even though it's the same court in a different case, if there is a law of the case problem here, we can get around the law of the case problem there.

THE COURT: I think that means you're in a tougher position, not me.

MR. BAINE: I would accept that modification of my statement, yes. Principal tradition of law of the case would say that the law of this case as of today is that we can't send the teachers to the parochial schools. That is the law of this case today. And --

THE COURT: I can't change that by holding my finger up to the wind and reading concurrences and dissents even if nine of them had explicitly questioned Aguilar. The law of the case would prohibit me, if nothing else.

MR. BAINE: To this extent, this motion is, to my knowledge, unprecedented. I know of no case in which a court has grant or denied an application like this in which a party has come in and said, I know that we've been ordered not to do something, and we're ordered not to do something because the Supreme Court instructed the District Court to enter that order, and that would be regarded as the law of the case, but in other opinions the Supreme Court has said that was probably a wrong and erroneous thing to do.

So what I'm saying to you, and the only thing I can say, I'm looking for an exception to the law of the case. I recognize it's difficult for the Court to do that and the Court in this case, although I think it's a proper case to seek reconsideration, may feel constrained to say this is a proper

motion, the argument being there are exceptional circumstances warranting relief. I think a proper argument has been made, it's a substantial position on the merits.

I think there is good reason to believe that the defendants may be correct that the establishment clause as construed today can no longer support this construction. Having said that, I feel constrained by Aguilar to deny the motion. That may be the best that we can hope for here, and then the Supreme Court has the opportunity that it has asked for to reconsider the case.

The alternative, as I have said, and again the timeliness objection has been made on this one, but if the Court doesn't mind, I will address everything at once.

THE COURT: Let's make this clear, I don't have before me a motion to amend a pleading. You are about to refer to your declaratory judgment idea.

MR. BAINE: You don't.

THE COURT: I do want to hear from you now. I want to make it clear I don't have anything other than a request for a premotion conference in the other case. The Pearl case, correct?

MR. BAINE: That's correct.

Under the rules I felt that I had to ask for the conference before filing the motion. Quite frankly, I'm prepared to go back and think about the motion and confer with my colleagues about whether the motion is -- makes sense at this point, depending on what takes place today.

THE COURT: Having started the ball rolling, I want to ask you a couple of questions on it. This proposed new pleading which would seek declaratory relief on an issue that is not the issue in that other case, it's the issue in this case, what is the actual controversy under Section 2201, which creates the declaratory judgment remedy?

You would have to present to me for -- in order to get declaratory relief, an actual controversy. What is that controversy?

MR. BAINE: What we'd allege in such amended pleading is that were it not for the fact that the City of New York feels constrained by the Supreme Court's decision in Aguilar not to send -- by the injunction in this case -- not to send teachers onto the premises of parochial schools.

If a declaration were issued that that is not unconstitutional, we'd allege, the City of New York would do that. So when students and the parents, particularly the students whose parents are speaking on their behalf are being denied the most equitable -- most efficient, effective educational services that could be made available to them, services which the government would make available to them but for their understanding that the establishment clause precludes them from providing those services. We'd come in and say, we have standing because we want the services.

There is a controversy that involves a legal issue because our position is that we'd get the services, and we think the City would admit that they would provide the services if they were permitted to under the establishment clause.

And we have plaintiffs in that case, in Pearl, who

would provide the concrete adversity that is perhaps an essential ingredient of declaratory judgment action.

THE COURT: Wouldn't that relief, doesn't that boil down to your seeking a declaration from a District Court that a Supreme Court decision is no longer valid, a particular Supreme Court decision?

MR. BAINE: We're seeking a declaration it's not unconstitutional to put public teachers, public remedial teachers, on the premises of church related schools --

THE COURT: Which is the decision in Aguilar.

MR. BAINE: That's right.

And the Court may well say, I grant summary judgment to the other side on that, that issue has been decided by the Supreme Court, request for declaratory judgment denied. Judgment for the adverse party in the declaratory judgment case. You would deny by -- what we'd do --

THE COURT: I'm trying to think what this would mean. If you were to miss the deadline for reconsideration in the Supreme Court, one way to compensate for that might be to bring a declaratory judgment action, because you would have the controversy in that same sense and the adversity in that same sense. You would go back to that District Judge and ask that Judge to declare constitutional the conduct that was declared unconstitutional by the Supreme Court and then take that up.

MR. BAINE: And the Court would deny my request and the Court of Appeals would affirm and the Supreme

Court would deny cert and it would be a waste of time unless the Supreme Court were persuaded it made a dreadful mistake. It could deny cert still.

THE COURT: Does that seem right to you? Does that seem the way a declaratory judgment act was designed to be used, to get District Judges to declare wrong old Supreme Court cases based on intervening comments?

MR. BAINE: When the Court raised the question of the immediate application in the District Court, rather than making your timely motion for reconsideration in the Supreme Court, I think one might question whether such an application could be made in good faith.

There may well be sanctions attending that kind of filing, but here we have five justices that invited the reconsideration. We're just trying to find a way.

In answer to the question is that an appropriate way to go about trying to overrule precedents, I think it is. I think a party that finds its conduct constrained by a Supreme Court case that no longer commands a majority -- let's say we were in 1953 and dealing with Plessy v Fergerson [sic], you know, separate but equal facilities are violations of the Fourteenth Amendment. Let's file a complaint for declaratory judgment.

And we recognize the District Court may well feel it has to deny it under the authority of Plessy v Fergerson, that is a way to get that issue before the Court again now that we can read the intervening doctrinal changes and see today the case would come out differently.

Brown versus Board of Education, I don't know if it

was a declaratory judgment action or not, it may well have been, but certainly could have been. So I don't think it's inappropriate use --

THE COURT: You folks are steeped in this, not just in this case, but others, and are more familiar what is out there with respect to cases like this, and I am certain there are other cases percolating their way up, whether they are in the classroom instruction cases or these other cases that are more like Pearl on which reliance has been placed on Pearl?

MR. BAINE: There is Pearl itself. In that case -- to some degree the plaintiff's position is, well, the Supreme Court can take a case like Pearl, if it wants, and can overrule Aguilar.

But of course in Pearl what is being asked is -- by the plaintiffs is that Aguilar be extended. And we're saying, don't extend Aguilar. And if the Court were to agree with us and say without regard to whether Aguilar would be reaffirmed by the Supreme Court, no reason to extend it. If we were to prevail in the Court of Appeals, the issue would not get to the Supreme Court. Those kinds of cases would not result in the case being brought before the Supreme Court.

THE COURT: Any other cases of other districts sensing the winds are blowing in a different direction the way you're sensing to use these federal funds to put teachers in parochial schools?

MR. BAINE: Not in the Title One.

MR. WINEBRAKE: In the Helm case.

THE COURT: What is the status of that case?

MR. BAINE: It's awaiting decision --

MR. WINEBRAKE: Your Honor, one of the -- we contacted the attorneys. We were contemplating making this motion because we were hopeful that the Helm case would be working its way up.

We'd be willing to sit back and wait. That case is before the Fifth Circuit Court of Appeals, but the last I checked, which was four or five months ago, nothing had -- hadn't been moving through the system.

It's brought in a different context than -- there is a lot of procedural problems in that case too. We didn't feel it was very hopeful that case was going to really percolate up very fast.

We did a search for any other kinds of other cases and we could not find anything, that concern Chapter One, which is the same situation as we have in Aguilar, aside from the Helm case. But the last I checked, they were seeking appeal of the Fifth Circuit in Helm, and the attorney didn't sound very hopeful it was going to fly through.

THE COURT: What about the other cases that deal with Chapter One. But not within the classroom instruction which deal with circumstances like in Pearl? Have any of them gone to the Supreme Court?

MR. BAINE: There have been cases decided upholding the kinds of alternatives that the Court is considering in the Pearl case. In the Sixth, Seventh, the

Eighth and the Ninth Circuit, and in none of those cases did the plaintiffs who were challenging the programs seek cert. That's what has happened in the past. And I think I had made reference to that the last time we were here.

THE COURT: I think I offered to rule against you. I remember that.

MR. BAINE: There has been some willingness to the side of defendants and intervenors and defendants to be a little patient in recognition that all of these cases are in all these different circumstances. That maybe one will provide a second vehicle.

One of the things that has happened, all the cases have gone in favor of the defendants and not brought to the Supreme Court. And the other thing that happened, in the Kiryas Joel case, in which the issue was not presented in which the Court was faced with a rather unusual response to Aguilar that prompted a number of justices to say, we understand why you felt you had to do this, we put you in that awkward situation and we think Aguilar should be reconsidered. But the thing you chose to do doesn't square with the establishment clause.

In that case for the first time five justices said what we always suspected that they would say, that they thought Aguilar was wrong --

THE COURT: Did they say that?

MR. BAINE: Four said they thought it was wrong. Kennedy said it may have been wrong.

THE COURT: Kennedy never had the benefit of the

full briefing on that issue.

MR. BAINE: Only three of them have, three of the justices from Aguilar are still on the court. Stevens, the Chief Justice, and Justice O'Connor.

THE COURT: The chief justice doesn't need the brief.

MR. BAINE: So maybe the statement they would have to take steps backwards to rule the other way.

THE COURT: Thank you.

Do you want to switch sides?

MR. SIMPSON: Before the argument today, Mr. Baine said I should be in the middle. I guess in a sense we are. I'll be very, very brief in this point. Although I probably would like to have a little rebuttal.

The Secretary of Education concurs in the concerns that led the Board and the intervenors to file the motions. We recognize that the Supreme Court's decision in this case has caused serious problems in the Title One program. And those problems effect both private school students and public school students.

I think one of the problems that most troubles the Secretary of Education along these lines is the fact that a portion of the funds that are being spent in Title One never reaches the students as educational benefits. The cost of the post-Agular [sic] delivery methods. The Secretary supports efforts to have the Supreme Court reconsider its decision in

the Agui. case.

Slightly different point, so that we're not misunderstood as to what we said in the written response, in this response, a little to some of the things Mr. Geller said in his papers, in a sense using our response in his favor. We concur in the Board's and the intervenors' position that this court can and should decide these motions for relief of judgment.

Although we believe the Court is not free to grant the motions, we feel that the Court can and should decide them. We disagree with Mr. Geller's position that the Court should not even entertain the motions. So we urge the Court to decide these motions.

THE COURT: To deny them?

MR. SIMPSON: Well, I guess that's the inevitable result. We feel the Court cannot grant them and we urge the Court to decide them.

THE COURT: Mr. Geller.

MR. GELLER: I feel maybe I should say nothing because it appears that at least I may be far ahead, and I was always told that was the point at which you should grab your briefcase and walk out of court.

THE COURT: Very few lawyers that can do that.

MR. GELLER: I assume Your Honor is still considering some issues here, and I hesitate just to walk out of the court.

What bothers me, and what confuses me is a distinction that the defendants try to impress upon you that although you cannot overrule the United States Supreme Court, you can say in this case that Rule 60(b) is a proper vehicle for what they are seeking to do.

That has been said again and again and no one has rationalized it. If Aguilar is the law of the land because it has not been overruled, how can a Rule 60(b) motion be a promotion for relief from Aguilar?

And it's clear that going -- bringing a proceeding to gain relief from Judge Neaher's judgment as the injunctive part of the judgment is really a ploy.

Judge Neaher was ordered -- ordered by the Court of Appeals, which had been affirmed by the United States Supreme Court to hand down that injunction and to declare -- in Judge Neaher's decision -- to declare that on-premises teaching and counseling is unconstitutional. With that in mind, 60(b) cannot be a proper vehicle.

THE COURT: Let me interrupt you for a second, respectfully. I don't want to put you in a position where you give your adversaries advice.

What else are they supposed to do? The Supreme Court agreed with you back then in Aguilar, yet there is no denying there is a substantial number, and five is the magic number for our purposes or their purposes. Substantial number of justices that at the very least want to reconsider the Court's decision in Aguilar.

All they are trying to do is give them that opportunity, so whether it's 60(b) -- I'm not suggesting that

you give them advice -- but why shouldn't I agree with you and say denied, I can't overrule Aguilar, and give them the opportunity to fight it out with you one more time up the appellate ladder?

MR. GELLER: I think you stated all the reasons. One is because this is the District Court in which Aguilar was decided in, which the injunction was issued, and because you have the mandate of the United States Supreme Court, and you have it as the law of the case, you cannot give this kind of relief.

THE COURT: What is it you want me to do? How do you want me to decide this motion?

MR. GELLER: I don't think you should even entertain it.

THE COURT: Tell me what that means.

MR. GELLER: It's clearly outside your power. It's filed. It's filed in the District Court.

THE COURT: What do you want me to do, not decide it?

MR. GELLER: If you deny it because of the fact that you cannot overrule the United States Supreme Court, which you have indicated, and because 60(b) is not a proper vehicle for your doing so, then I would think that the Second Circuit would give this matter short shift.

And I think even the judges who are opposed to the plaintiff's position in the United States Supreme Court would give the matter a short shift if they had concern, as I think

they do, for proper procedure, for the proper use of Rule 60(b), and the proper way to bring a case to the United States Supreme Court.

I have enough faith, at least in Justices Kennedy and O'Connor, that they would not accept this as a proper vehicle for overruling Aguilar.

THE COURT: Suppose the City -- forgive me for interrupting. You have lots of ideas in what you say and I don't want to lose sight of them.

Suppose the City were to just go ahead and put one teacher in one parochial school, is that what they have to do in order to frame this issue procedurally in a way that they can do to give the Supreme Court --

MR. GELLER: Far be it for me to suggest what they have to do. My background teaches me if there was a law on the books that was so detrimental to my state, my city, my country, I would say, okay, I may be held in contempt of court, but I'm going to see to it that that law is overruled.

This wonderful restraint that the City shows is perhaps admirable, but Your Honor has suggested that that is one way. I don't counsel it.

I make this other point --

THE COURT: Should I decide the 60(b) in a motion in a way that sends the message that unless you violate a court order you can't get review of a ruling? Shouldn't I -- isn't there a certain respect in which maybe they should be commended for coming in under 60(b) rather than doing

what would clearly get review in being in contempt of Judge Neaher's order and have me judge them in civil contempt?

MR. GELLER: I don't think so, but I want to make one other point. The ruling in Aguilar, as far as I understand it, has been followed in 50 states. 50 states, and 49 of them are not under any injunction whatsoever.

And yet as far as I know, I'm not familiar with the Helm case that the other side mentioned, but I don't believe any other school district board has seen fit without having to risk being held in contempt to send a public school teacher into a religious or parochial school.

It's rather remarkable -- New York City is the only -- only district -- or the Chancellor and the Board of Education is the only school district board in the entire country that feels that it needs relief from Aguilar.

THE COURT: Which way does that cut? Doesn't that suggest that unless I give them a vehicle to have this issue get decided once and for all, again, that it's never going to get decided even though the Supreme Court wants to revisit it?

MR. GELLER: If you have to make a decision, because you don't want to distort the entire -- it's more substantive as well as procedural law of the land -- yes, I would say, yes, that is your duty.

Just consider, Your Honor, if this were a proper vehicle or the declaratory judgment motion, I would like to get to that, that is suggested by Mr. Baine and the intervenors, if that were -- if those means were proper, can't imagine how many hundreds, may be thousands of state and

even federal courts would have challenged the Brown against Board of Education or -- I don't know what other -- just to say we need relief from these, or we should get another ruling on the chance that sufficient number of judges in a changed court would overrule the prior decision.

THE COURT: Isn't it true, though, if you change the facts, you might change what the outcome is? There never have been five or even three justices of the Supreme Court that have explicitly questioned Brown versus Board of Education, much less called for it to be overruled forthwith.

Aren't these folks in a different setting? I mean, they have a good faith basis, it seems to me to want to posture the issue in a way that they can get the review that the Supreme Court seems to have -- at least five members of the Supreme Court seem to invite.

Isn't that a different set of circumstances?

MR. GELLER: I'm not so sure you are entirely correct from reading Judge Friendly's decision in the Second Circuit in this case. He mentioned another case, in which apparently the justices of the court had indicated that they might decide the law in a different way.

But I don't think that a Rule 60(b) motion or a declaratory judgment motion is the proper case that even the five justices to which we're referring referred when they said -- Aguilar should be reviewed in a proper case.

THE COURT: Is there a way to properly put that issue before them in this case?

MR. GELLER: In this case, no. Not in this case --

nor in Pearl --

THE COURT: Let me take baby steps on the question. If they were held in contempt of Judge Neaher's order, wouldn't they then be able to appeal that and seek review of the very issue that they want me to address on this 60(b) motion?

MR. GELLER: If they were held in contempt?

THE COURT: Yes.

MR. GELLER: I suppose they would. You could appeal, although that might be decided -- I don't want to prejudge this against my own interests. I don't know what would happen if you actually brought -- decided -- the Board decided to send a public school teacher, giving Chapter One instruction into a religious school in this city, and then we moved as we would to hold them in contempt, whether that would precisely raise the issue that they want to raise before the United States Supreme Court. But, probably would, if I were to be perfectly frank, I think that it would.

That is another point. In none of the papers that I have filed for the plaintiffs in this case have I had occasion, and therefore have I actually argued the merits either on the facts or the law of the proposition that it is constitutional, permissible to send a public school teacher into a religious school.

It was stated by, I think by Mr. Baine, that all of this has been briefed. It has not been briefed. There is nothing in the 90 -- 60(b) cases that briefs the point that they want to have briefed, and that is the merits of the proposition

whether it's constitutional to send a public school teacher into a religious school. That has not been briefed.

They have all sorts of facts in the declaration of Ms. Weiss in which she states how expensive and burdensome it is, because long ago Judge Friendly said, of course when we decide the case as the Second Circuit decided it in Felton, which became Aguilar, the Second Circuit, and it was a unanimous decision said, we know it's going to be much more expensive, but that doesn't matter. We haven't had a chance in the 60(b) motion, nor would we in a declaratory judgment motion.

But I would like to address myself to the declaratory judgment motion. It was stated by Mr. Baine, I think I quote him, it would be a waste of time to, in effect, to make the motion for a declaratory judgment in the sense that you would immediately deny it. But that's one of the three bases, as I understand it, for not allowing a motion to amend.

If the motion to amend is granted and that would be futile, as Mr. Baine indicates he knows it would be because you would not overrule the United States Supreme Court, then the motion to amend should be denied as futile, period.

And it -- that too would not be a vehicle any more than the Rule 60(b) motion.

THE COURT: How is the law supposed to change, though? Why shouldn't people -- the only example leaps to mind is in Monell when the Supreme Court held a municipality can be a person under 1983.

The way it gets up there by people making arguments

below that they know are going to lose so that they can get the Supreme Court review of it.

Why shouldn't I permit that to happen?

MR. GELLER: You must understand that I don't, and my clients don't believe the law should be changed at all. How is the law to be changed because four Judges have indicated --

THE COURT: I have a more generic question. Isn't there a way the law grows to allow people to make arguments to lower courts like me that they know will lose so that they can preserve the issue?

If they are not allowed to make the arguments, by the time they get to the Circuit or to the Supreme Court, your argument is they have defaulted by not having raised it in The District Court.

Isn't it permissible to let them make arguments, as you say they know they'll lose, so that they can have an opportunity to have the law in its natural way get tested and maybe agree or not agree?

MR. GELLER: I think we have a concession. It was Mr. Baine also arguing that he acknowledged that, and I think the other counsel have acknowledged that the Rule 60(b) motion has never, never been used before, nor do I believe that the declaratory judgment procedure has ever been used to enable a District Court to overrule the Supreme Court and have the case go up that way.

All I'm asking is that you follow the normal procedure, within which neither the Rule 60(b) motion nor

the declaratory judgment suggestion, because it's not a motion yet, does not fall. They are outside accepted practice for getting a case before the United States Supreme Court.

THE COURT: Doesn't that produce sort of an ironic result, which is that the very people who got into this dispute to begin with, the City and the Chancellor, and the defendant intervenors, are they the only ones who are now interested in the issue, who can't get it reviewed because anyone else around the country, any other school board can simply put a public school teacher in a parochial school, have it litigated, have the issue go up, and the result of what you say is that the very people who started this dispute, and for all I can tell, may have the keenest interest in it, the largest school boards in the country are the ones who are now procedurally barred from getting appellate review or Supreme Court review of it, short of denying a lawful order of the Court? Is that the result of your argument?

MR. GELLER: It kinds of twists the position a little bit. They only got themselves in this spot because the plaintiffs in Felton brought this case to start with.

And then I come to another point that I overlooked, and then what the United States Supreme Court said was simply, no, you can't have a public school teacher and counselor go on to the premises of religious schools. Period.

The Court didn't say what else they can do. But what New York City has done --

THE COURT: Short of having themselves held in contempt, it's your position that they cannot get appellate scrutiny of the issue decided in Aguilar?

MR. GELLER: Yes. And I think that is proper. First of all, I think it's still the law of the land, but secondly, as I was just now arguing, they're the only school district that has placed itself in the absurd position of spending so much money that they cannot -- that they need financial relief from Aguilar. They are the only ones.

They somehow got themselves into a ridiculous contract for the MI use at an expense that is fairly greater than any other school district board. But all of their expenses are completely out of wack.

And I repeat, they are the only board that even thinks of seeking relief from Aguilar.

THE COURT: But your position was that the expenses are irrelevant. Whatever they are, whether they are prudent or bad, they are a necessary consequence of the constitutional determination made by the Supreme Court?

MR. GELLER: Yes.

THE COURT: Let's not worry about whether there are good people, good contracts involved.

MR. GELLER: That is the excuse in the Rule 60(b) motion.

May I say one thing? This argument that somehow the Rule 60(b) motion procedure is proper, as I read 60(b), there is one way in which you can utilize 60(b) to get relief with respect to a change in the law, and I think that is in 60(b)(5) which says if the change is a result of a decision being vacated or overruled.

THE COURT: Or it's no longer equitable that the judgment should have prospective application.

MR. GELLER: I don't think that would apply in the case of a mandate. So that is why they seize upon the injunction provision in Judge Neaher's final judgment and overlook the declaratory part of the judgment which states that it is constitutionally impermissible to send public school teachers into religious schools. That equitable argument is not available to them.

The only thing that is available to them, and they argue it, is change in the law. And the change of the law specified in Rule 60(b) is that the change where there has been a judgment that has been reversed or vacated, or I would add, overruled. This is not proper procedure.

One other argument with respect to the declaratory judgment, or maybe two, it's long past the time. I don't know what stage your decision is at on the motion for summary judgment. It's as if somebody were asking to amend their pleadings after the case had gone to trial.

THE COURT: On that score, let's -- I don't mean to curtail your argument. I understood Mr. Baine to suggest that he's going to go back to the drawing board and speak to his colleague. We may not have that motion. Am I correct about that?

MR. BAINE: Your Honor, I certainly, at the conclusion of this hearing, I will confer with everybody and decide whether to file the motion, and at that time we can argue whether it's untimely. I'm prepared to address that today, if the Court wants it. We haven't filed it yet, and under the rules, I thing we have to have a conference before

we file it.

THE COURT: Just so it's clear, there is no reason for you to know it, a pre-motion conference is not a motion to make a motion. I can't stop them from making the motion. I have no intention to. If it's your desire to make the motion, Mr. Baine, just once you finalize that, contact Ms. Virno for a motion schedule.

For what its worth, having thought this through a little bit -- and this is by no means a ruling on the motion, it's not briefed, I haven't had the benefit of briefing on it, but it does strike me as an odd use of the declaratory judgment statute.

More importantly, the concern alluded to by Mr. Geller to, the timeliness of it, wholly apart from whether you can use the declaratory judgment statute to get a District Judge basically to overrule a Supreme Court decision. That timeliness factors strikes me as one that's worthy of considerable weight in your ultimate decision whether to file the motion.

MR. GELLER: I would also stress the futility aspect. It has been conceded that you would deny the motion on the grounds that you cannot --

THE COURT: There is no distinction as to an issue whether it's constitutionally permissible for a public school teacher to go to the premises of religious schools, and the issue whether Aguilar should stand or fall. Mr. Baine words it in the former way, but it's the same.

Why does futility matter? I don't think we should belabor the issue. You mentioned this before and I'm not

sure why futility matters.

How many times in 1983 did plaintiffs try to, in what was a futile gesture before Monell, try to bring in municipal defendants under 1983 until Monell got decided?

And it seems to me plain that folks ought to be allowed to seek relief that may be precluded by the case law if for no other reason than to preserve the issue.

So futility, again, if the motion is filed and you breach it with an open mind, I will listen to your arguments. I think it's helpful to the present motion conferences to share our preliminary thoughts and my preliminary thought on the futility issue, it's not a very weighty concern.

MR. GELLER: The only reason I make it and have a practical reason, on a motion to amend I understand that futility is a powerful argument. That would not stop them from starting a new action for declaratory judgment.

But if they started a new action for declaratory judgment, I would have all the rights of a defendant, or my clients would in that action with respect to discovery, so we can get into on the merits on the facts and on the law the issue as to whether it should be constitutionally permissible to send public school teachers into religious schools.

THE COURT: You have done all of that.

MR. GELLER: I never argued the merits of Aguilar.

THE COURT: I'm not talking about arguing the merits. I'm talking about discovery. What discovery?

MR. GELLER: The discovery has been only to the financial aspects of the present plan.

THE COURT: Let me do this. Let's get back to the motion that is on the table. If you have anything further, as to the declaratory judgment, the proposed -- the prospective motion for leave to amend to assert a claim for declaratory judgment, we'll wait and see whether it's filed.

You will take into account, for whatever it's worth, our discussion here today. If it's filed, you will get a schedule from Ms. Virno. I will read the briefs carefully and we'll have argument on it.

Anything further with respect to the Rule 60(b) motion, Mr. Geller?

MR. GELLER: No, Your Honor.

THE COURT: I have one more question for you.

I'm not sure precisely what it is if you were to prevail on this motion, precisely what it is you want the order to say. And my confusion arises from your request that I should not entertain the motion.

MR. GELLER: Well, I think my point, in the most dramatic way, is that you should deny the motion on the grounds that you do not have the -- two grounds, you do not have the power to overrule the mandate of the United States Supreme Court.

And, number two, 60(b) is not a proper vehicle for you doing so, in any event. That would deny the motion on its clear procedural grounds, which is the way I would like

it to go up. Because then I don't think even the majority on the Supreme Court would touch it, because they would not want to distort the procedure law of the land, or the common law, for that matter.

THE COURT: Thank you, sir.

MR. BAINE: Your Honor, may I make one brief comment?

THE COURT: Yes.

MR. BAINE: I've been thinking about a question that you asked me. I'm not sure that I gave a complete answer. The question of the alternative of citing, putting the City into contempt. I think it's an interesting issue and would warrant further research.

I'm not actually sure that the City could be confident of framing the legal issue on appeal by putting itself in contempt because of the collateral bar rule which says you may not disobey a court order and defend the contempt judgment on the ground that the order was unlawful. You must seek review of the order. And I don't know how that works in this case because I haven't thought it through.

It's not obvious that you can disobey an injunction, put yourself in contempt and appeal the contempt -- the contempt order on the ground that the underlying order that you violated was unlawful in general. The collateral bar rule says you may not do that. It's not clear that the contempt avenue is open to the City. Further underscoring the importance of providing --

THE COURT: But they did challenge that order,

though, right?

MR. BAINE: It's why it's a kind of novel question. We'd argue that you could appeal the contempt order on the ground --

THE COURT: Otherwise they're really in a box without -- if Mr. Geller is right -- they are in a box without any way out.

MR. BAINE: I don't think it's obvious it can be appealed on the ground the underlying record is no longer valid. It would be a unique twist to the collateral bar rule.

THE COURT: It's an excellent point. You might find yourself being held in contempt of an order that is based on precedent, that it's now obsolete, that doesn't alter the validity of the order.

Even if the order itself were illegal, you could be held in contempt.

MR. BAINE: My response is that it's only open to you when there is an opportunity for review, but I don't think the answer is obvious.

THE COURT: Let me ask counsel for the City defendants -- I was looking for -- where was the resolution attached -- I read the resolution.

MR. WINEBRAKE: Attached as Exhibit 2 to the Weiss affidavit, Your Honor. It is summarized in the memo of law.

MR. GELLER: It's asking Your Honor to overturn a decision of the United States Supreme Court.

THE COURT: I might have posed this question to the wrong person. What is the Board's position on when the developing case law, and I'm directing you to the timeliness of the 60(b) motion, what's the Board's position as to when the developing case law congealed to the point where it could properly come back before a court and seek relief from the Aguilar decision?

MR. WINEBRAKE: Your Honor, as I think Mr. Baine put it best when he said that process began of course on the date in the summer of '94 when the Kiryas Joel case was decided. This case was made public. The dissents were made public at that time. There were subsequent developments in which this idea, in which this neutrality principle --

THE COURT: When was Rosenberger decided?

MR. WINEBRAKE: The Zobrest case, Your Honor.

THE COURT: When was Rosenberger decided?

MR. WINEBRAKE: In 1995.

MR. BAINE: June 29, 1995.

THE COURT: It's after this resolution.

MR. WINEBRAKE: Zobrest was decided before the resolution.

Your Honor, there is a couple of other -- with regard to the timeliness, there are a couple of other factors that the Court should consider. This, as you can imagine, was a politically sensitive matter with the Board. And there was

obviously -- this didn't just all emerge in the summer of 1995. There was a lot of -- there was a lot of back and forth between the legal counsel to the Board of Ed and the legal counsel to the Chancellor and various factions within the seven member Board of Education concerning whether the City of New York wanted to take a public position whereby we'd seek reversal of this case. One person abstained. One person descended from the resolution, and five Board members voted in favor of the resolution. However, you know, an issue like this does take several months to kind of work itself -- to work itself to a resolution. That's a factor that I think the Court should consider.

In rehearing the propriety of the Rule 60 motion, we felt in a situation like this, it's really hard -- it's really hard to pinpoint the date at which the change in the law, you know, is manifested.

We'd ask that the Court consider that, first of all, it took several months for the Law Department as well as the Board of Ed's legal staff to understand the implication of the Kiryas Joel decision. There were then subsequent jurisprudence decisions that were considered.

There were a lot of political -- a lot of political back and forth between various factions and interest. I really feel, Your Honor, that the fact that we were able to pass a resolution just about exactly one year from the date that the Kiryas Joel decision came down, given that -- it's actually very reasonable, and I believe people at the Board worked hard on that.

Also, the Board during the summer months is not as

active. We acted promptly and expeditiously. The Board carefully studied what it was doing before it voted on the resolution.

I don't think it's unreasonable for a matter of this constitutional importance took a year.

THE COURT: Thank you. Thank you all. I'm going to take the motion under advisement.

MS. RICHTER: Since you sort of considered the prehearing conference on the proposed motion on the declaratory judgment together with the argument on the Rule 60(b), I wanted to add something in terms of the concern of both the defendants, City, the Board of Education, the Chancellor and the State of New York, who is not here today because they are not parties to the Felton matter, although they are parties to the Pearl matter in which the proposed motion would be made, and I'm authorized to speak for them as well.

Again, this is not on the substance, but it was just on the procedural issues. I thought perhaps it would clarify our position if we knew what the procedural aspects of this, or implications of Mr. Baine's proposal motion might be.

Our concern is that if Mr. Baine does make his motion, not to delay the decision in the motion now before you, and because that is a procedural issue rather than substantive issue, I was wondering if the context of the pre-motion conference you could give us some guidance as to that we'll know what position to take in an informed way in terms of Mr. Baine's proposal.

THE COURT: I think I understand your question, if

that is a question.

I have before me in the other case a motion for summary judgment. I have before me this 60(b) motion. None -- the resolution of neither of those depends in any respect on whether Mr. Baine's files his motion or when.

In fact, if there is a resolution of either or both, the timing of that may effect whether he chooses to file. But you will seek your own counsel as to how to proceed. I will not give you advice. I will not tell you when I'm going to decide the two motions that I have under submission.

I will say this, I'm sensitive to the need -- sensitive at least to the desire for a speedy resolution of the 60(b) motion -- and sensitive, generally speaking, to the desire of people to have their cases decided and not sat on by District Judges.

That's a long-winded way of saying, do what you will with regard to your anticipated or prospective declaratory judgment -- motion to amend the pleadings, but it won't have any bearing on the resolution of these other motions that are pending.

Does that answer your question?

MS. RICHTER: I think so.

THE COURT: If it doesn't, follow up. I don't mean to be skeptic. I didn't exactly understand your question, to be honest with you.

MS. RICHTER: I think you were answering my question. The question concerns not any bearing that the

proposed motion might have on the determination in terms of the outcome. It's just a question about the timing of the decision that we now have the Pearl motion, the 60(b) motion and the proposed motion. And our concern is that the proposed motion may impact on the 60(b) motion so as to delay that determination.

THE COURT: Okay.

MS. RICHTER: As you recognize, we have an interest --

THE COURT: I thought I answered that. No, it will have no bearing on the resolution of these two other motions or the timing thereof.

MS. RICHTER: Thank you.

THE COURT: Thank you everyone.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

NOTICE OF APPEAL

78- CV-1750 (JG)

Plaintiffs,

- against -

SECRETARY, U.S. DEPARTMENT OF EDUCATION, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants,

RACHEL AGOSTINI, et al.,

Defendant-Intervenors

----------x

PLEASE TAKE NOTICE that Defendants Chancellor and the Board of Education hereby appeal to the United

States Court of Appeals for the Second Circuit, from the order and memorandum decision (one paper) of the Honorable John Gleeson herein dated May 20, 1996 and entered in the Docket on or about the same date, which denied defendant's motion seeking relief from the injunction issued September 26, 1985 enjoining the New York City Board of Education from using Chapter I funds to send teachers and guidance counselors into private schools (majority being religious schools), and this appeal is taken from each and every part of said order and memorandum decision (one paper) as well as from the whole thereof.

Dated: New York, New York
June 5, 1996

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON,
CHARLOTTE GREEN,
BARBARA HRUSKA,
MERYL A.SCHWARTZ,
ROBERT H. SIDE
and ALLEN H.
ZELON,

Plaintiffs,

-against-

SECRETARY, UNITED STATES
DEPARTMENTOF EDUCATION,
CHANCELLOR OF THE
BOARD OF EDUCATION
OF THE CITY OF NEW YORK
and BOARD OF EDUCATION OF
THE CITY SCHOOL
DISTRICT OF THE CITY
OF NEW YORK,

Defendants,

-and-

RACHEL AGOSTINI, et al.,

Defendant-Intervenors.

78-CV-1750 (JG)

CROSS-NOTICE OF APPEAL

Please take notice that plaintiffs appeal to the United States Court of Appeals for the Second Circuit from so much of the order and memorandum decision in this action made

by the Honorable John Gleeson, dated May 20, 1996, and entered in the docket on or about the same date, as determined (1) that the defendant Board of Education of the City School District of the City of New York ("Municipal defendant") and, by implication, the defendant-intervenors may properly proceed under Rule 60(b) of the Federal Rules of Civil Procedure to seek relief from the judgment entered herein of the Honorable Edward R. Neaher, dated September 26, 1985, pursuant to the mandate of the United States Supreme Court in *Aguilar v. Felton*, 473 U.S. 402 (1985), (2) that the Municipal defendant and defendant-intervenors may by motion under Rule 60(b) properly seek review of the determination of the United States Supreme Court in *Aguilar v. Felton, supra,* (3) that the Municipal defendant and defendants-intervenors may properly seek review of the underlying merits of *Aguilar v. Felton, supra,* on the basis of the record made on their motions under Rule 60(b) herein, (4) that the Municipal defendant and defendant-intervenors are entitled to the relief they seek in their motions under Rule 60(b) without a plenary hearing of the issues raised below with respect to the alleged need for such relief, and (5) that the motions made by the Municipal defendant and defendant-intervenors herein were properly determined "on the merits", as opposed to their having been denied *ab initio* on procedural and jurisdictional grounds.

Dated: June 17, 1996

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,
Plaintiffs,

NOTICE OF APPEAL

78 CV-1750 (JG)

-against-

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,
Defendants.

and

RACHEL AGOSTINI, MARIA COSARCA, DIGNA DURAN, IVETTE ENCARNATION, MARIA L. FERNANDEZ, DOLLY CUTRERA THEN and JOSEPH M. THEN, MARGARET FIGUEROA, MICHELE GALLO, MARIE SEJOUR, JOAN JACKSON, CHERYL MALCOUSU,

TONYA STEVENS, and
ROSEMARIE VASQUEZ,
Defendant-Intervenors.

PLEASE TAKE NOTICE that Defendant-Intervenors Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then and Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens, and Rosemarie Vasquez hereby appeal to the United States Court of Appeals for the Second Circuit, from the order and memorandum decision (one paper) of the Honorable John Gleeson herein dated May 20, 1996 and entered in the docket an or about the same date, which denied Defendant-Intervenors' motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from this Court's Judgment, dated September 26, 1985. This appeal is taken from each and every part of said order and memorandum decision (one paper) as well as from the whole thereof.

Dated: New York, New York
June 17, 1996

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(6) (8)

Nos. 96-552 and 553

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

– No. 96-552 –

RACHEL AGOSTINI, ET AL.,

Petitioners,

vs.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

(For Continuation of Caption, See Reverse Side of Cover)

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF FOR PETITIONERS CHANCELLOR AND BOARD OF EDUCATION OF THE CITY OF NEW YORK

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– No. 96-553 –

CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, ET ANO.,

Petitioners.

vs.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

QUESTIONS PRESENTED

1. Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief petitioners seek?

2. Whether the Court should overrule its holding in *Aguilar v. Felton*, 473 U.S. 402 (1985) that municipal petitioners may not, consistent with the Establishment Clause of the First Amendment, provide federally-funded remedial and educational services through petitioners' professional employees to eligible students on the site of parochial schools which such students attend?

PARTIES TO THE PROCEEDING

Petitioners under docket 96-553 are the Chancellor of the Board of Education of the City of New York and the Board of Education of the City School District of the City of New York. They were defendants-appellants in the Court of Appeals.

Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnation, Maria L. Fernandez, Dolly Cutrera Then and Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens, and Rosemarie Vasquez, petitioners under docket 96-552, were intervenors-defendants-appellants in the Court of Appeals.

The Secretary of Education is a respondent under both dockets 96-552 and 96-553 and was a defendant-appellee in the Court of Appeals.

Betty Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side and Allen H. Zelon are respondents under both dockets and were plaintiffs-cross-appellants in the Court of Appeals.

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BRIEF FOR PETITIONERS CHANCELLOR AND BOARD OF EDUCATION OF THE CITY OF NEW YORK

OPINIONS BELOW

The order of the Court of Appeals, which under its rules will not be reported in the Federal Reporter, is reprinted in the Appendix to the Petition under docket 96-553 at A2-5. The decision of the United States District Court for the Eastern

District of New York, which is unreported, is contained in the Appendix to the Petition at A6-21. This Court's prior opinion in this case, *Aguilar v. Felton*, is reported at 473 U.S. 402.

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 1996. A timely petition for a writ of certiorari was filed by petitioners Chancellor and Board of Education on October 4, 1996 and docketed under docket no. 96-553. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C., § 1254(a). On January 17, 1997, the Court granted the petition, and ordered it consolidated with the case under docket no. 96-552, *Rachel Agostini, et al. v. Betty Louise Felton, et al.*

CONSTITUTIONAL STATUTORY, AND REGULATORY PROVISIONS

First Amendment, United States Constitution

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant Provisions of Title I of the Improving American Schools Act of 1994

20 U.S.C. § 6321, Participation of children enrolled in Private Schools

(a) General Requirement

(1) In general

To the extent consistent with the number of eligible children identified under section 6315(b) of this title in a local educational agency who are enrolled in private elementary and secondary schools, a local educational agency shall, after timely and meaningful consultation with appropriate private school officials, provide such children, on an equitable basis,

special educational services or other benefits under this part (such as dual enrollment, educational radio and television, computer equipment and materials, other technology, and mobile educational services and equipment).

(2) Secular, Neutral, Nonideological

Such educational services or other benefits, including materials and equipment, shall be secular, neutral, and nonideological.

(3) Equity

Educational services and other benefits for such private school children shall be equitable in comparison to services and other benefits for public school children participating under this part.

(4) Expenditures

Expenditures for educational services and other benefits to eligible private school children shall be equal to the proportion of funds allocated to participating school attendance areas based on the number of children from low-income families who attend private schools.

(5) Provision of services

The local educational agency may provide such services directly or through contracts with public and private agencies, organizations, and institutions.

(b) Consultation

(1) In General

To ensure timely and meaningful consultation, a local educational agency shall consult with appropriate private school officials during the design and development of such agency's programs under this part, on issues such as --

(A) how the children's needs will be identified;

(B) What services will be offered;

(C) How and where the services will be provided;

(D) how the services will be assessed; and

(E) the size and scope of the equitable services to be provided to the eligible private school children, and what is the proportion of funds allocated under subsection (a)(4) of this section for such services.

* * *

(c) Public control of funds

(1) In general

The control of funds provided under this part, and title to materials, equipment, and property purchased with such funds, shall be in a public agency, and a public agency shall administer such funds and property.

* * *

20 U.S.C., § 6322 Fiscal Requirements

* * *

(b) Federal funds to supplement, not supplant, non-Federal funds

(1) In general

(A) Except as provided in subparagraph (B), a State or local educational agency shall use funds received under this part only to supplement the amount of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds.

(B) For the purpose of complying with subparagraph (A), a State or local educational agency may

exclude supplemental State and local funds expended, in any eligible school attendance area or school for programs that meet the requirements of section 6314 or 6315 of this title.

* * *

Regulations of the Secretary of Education

34 C.F.R.:

§ 200.12 Requirements to ensure that funds do not benefit a private school.

(a) An LEA shall use funds under this subpart to provide services that supplement, and in no case supplant, the level of services that would, in the absence of Title I services, be available to participating children in private schools.

(b) An LEA shall use funds under this subpart to meet the special educational needs of participating private school children, but not for --

(1) The needs of the private school; or

(2) The general needs of children in the private school.

§ 200.27 Reservation of funds by an LEA.

Before allocating funds in accordance with § 200.28, an LEA shall reserve funds as are reasonable and necessary to -

* * *

(c) Administer programs for public and private school children under this part, including special capital expenses not paid for from funds provided under § 200.16 that are incurred as a result of implementing alternative delivery systems to comply with the requirements of *Aguilar v. Felton;*

* * *

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief and subject matter jurisdiction is invoked under 28 USC § 1331 because the action arises under the United States Constitution and federal law. In *Aguilar v. Felton*, 473 U.S. 402 (1985), this Court, by a 5-4 majority, held the Board's method of providing federal Title I services to needy students who attend parochial schools violated the Establishment Clause because Board of Education teachers and other professionals provided their remedial and related educational services on the premises of parochial schools. The program involved in that decision, originally enacted as Title I of the Elementary and Secondary Education Act of 1965, and later superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, authorized the Secretary of Education to distribute financial assistance, through the states, to local educational institutions to meet the needs of educationally deprived children from low-income families.

Pursuant to Title I, federal funds are provided for remedial, supplementary education and support services for elementary and secondary school students. JA 309.[1] Although the statutory scheme considered in *Aguilar* has been superseded by subsequent legislation, most recently by Title I[2] of the Improving America's Schools Act of 1994, codified at 20 U.S.C. § 6301 *et seq*, the provisions relating to private school students have remained essentially unchanged. Title I benefits are available to all eligible students, within fiscal limitations, including those who attend parochial schools. 20 U.S.C. § 6321. Title I funds can be used only to supplement, not to

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[1] Numerical references preceded by the designation "JA" are to the Joint Appendix. References preceded by "A" are to the Appendix to the Petition under docket 96-553 submitted by the petitioners Chancellor and Board of Education.

[2] For purposes of clarity, all references to the statutory schemes in effect at various times will be by the term "Title I."

supplant, the public or private school student's regular classroom work. *See* 20 U.S.C. § 6322(b). Title I services provided to private school students must be "equitable" in comparison to services provided to participating public school students. 20 U.S.C. § 6321(a)(3), (d); 34 CFR 200.10-11 (1996). All services and materials provided with Title I funding must be secular, neutral and nonideological, and the control of all funds and title to all equipment provided under Title I must be in a public agency. 20 U.S.C. § 6321(a)(2) & (c)(1).

The pre-Aguilar program

Beginning in 1966, New York City's Board of Education provided Title I services on premises to students at private schools, during the school day. JA 64-65. This was done only after attempts to provide the services by alternative means, including providing the services after the school day, proved unsuccessful. JA 312. Under the original 1965 program, the Board attempted to provide services to private school students by requiring them to travel to public schools after regular school hours to receive remedial services from Board employees. JA 63. Attendance was poor, and later in the 1965-66 school year the Board transferred some Title I services to private schools after school hours. JA 63. However, attendance remained poor. Under both approaches, teachers were tired, students inattentive, parents expressed concern about the safety of their children, and there was little communication between Title I professionals and the classroom teachers. JA 63-64.

Accordingly, in August 1966, the Board adopted a program for providing remedial services to disadvantaged children on private school premises during the school day. The services would be provided by teachers in the public school system who would go from one school to another during the school day, and none of the work would duplicate any of the regular classroom work of the schools involved. Certain proposed programs, like speech improvement and library services, were rejected as being too close to regular classroom work or

providing services to the private schools rather than the children. JA 64-66.

Under its on-site program, the Board provided a number of remedial services to students at private schools: remedial reading, remedial mathematics, English as a second language, and clinical and guidance services. JA 45-46. Private schools with children receiving Title I instructional services typically set aside a classroom for exclusive use by Title I teachers. None of the private school facilities used for Title I programs contained any religious symbols or artifacts. JA 58-59. The teachers assigned to the private school Title I program were regular salaried employees of the Board of Education. JA 46. Determination of which private schools a teacher or other professional would serve in was made by the Board's Bureau of Nonpublic School Reimbursable Services; private school officials had no voice in the assignment of a Title I teacher. JA 48. Religion was not a factor in Title I assignment. JA 48. The amount of time a Title I teacher would spend at any particular private school was determined solely by the number and needs of the students eligible for Title I assistance; e.g., in the 1981-82 school year, 78% of teachers worked in more than one private school, with children in 180 of 231 private schools receiving services from itinerant teachers. JA 49.

Prior to assignment, the Title I professionals were given guidelines which emphasized that they were accountable only to their Title I supervisors, and not to any private school official. JA 50. They were instructed not to engage in team-teaching or other cooperative instructional activities with private school teachers, although they might engage in purely professional consultations with private school teachers concerning the students' needs and progress. JA 50-51. The teachers were directed not to introduce any religious matter into their teaching, and to refrain from any involvement in religious activities of the school. JA 51. The Title I professionals were supervised by field supervisors employed by the New York City Board of Education who were expected to make at least one unannounced visit each month to review the performance of the Title I professional. JA 52-53. Other

supervisors provided monthly in-service training sessions, frequently on days when private schools were otherwise closed for religious holidays. JA 54. A large majority of the Title I teachers worked in private schools which had religious affiliations different from their own, and there had never been a recorded complaint by a Title I teacher of interference by private school authorities, or a report by a supervisor that teachers had engaged in religious activities. JA 49-50, 52.

Teaching materials and equipment used in the Title I program were selected by Board employees, and did not duplicate materials used in regular classroom instruction or contain any religious content; all equipment and material was labeled as Board property, locked in storage when not used, and was subject to annual inventory. JA 55-57. While there were necessarily routine administrative contacts between the Board of Education and the private school officials, they consisted of three general categories of communication: 1) information about Title I; 2) processing requests for services by the schools; and 3) resolving scheduling problems and other questions concerning implementation of the Title I program. JA 59-63.

The Board's on-site program was highly successful, and participating students showed measurable improvement in overcoming their learning disabilities. JA 68-70. Indeed, Judge Friendly, in writing for the Second Circuit in *Felton v. Secretary, United States Department of Educ.*, 739 F.2d 48, 49 (1984), *affd. sub nom. Aguilar v. Felton*, 473 U.S. 402 (1985), stated that "the City could reasonably have regarded [the on-site program] as the most effective way to carry out the purposes of [Title I]." The Board's program was not atypical; prior to this Court's ruling in 1985 invalidating the Board's program, in New York State and across the nation Title I services to children attending religious-affiliated schools were largely provided inside the schools by publicly employed professionals. JA 309, JA 352-354.

Litigation and the Court's ruling in Aguilar v. Felton

In *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F.Supp. 1248 (S.D.N.Y.), *app. dsmsd. sub nom National Coalition for Public Ed. v. Hofstedler*, 449 U.S. 805, *reh. den.*, 449 U.S. 1028 (1980) (hereinafter, "Pearl"), an action to enjoin the allocation and use of Title I funds for the Board's on-site program, a three judge court, after an evidentiary hearing, made detailed findings as to the nature of the Board's program, and found the Board's program to be constitutional under the three-pronged test adopted by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In dealing with the issue of excessive entanglement, the court specifically found that the Board's employees scrupulously followed the Board's guidelines and considered their role as independent of the private school's instructional program, and that the Board's supervisory personnel had only casual contact with private school administration and little or no contact with private school teachers. Id., pp. 1267-68.

The subject action was commenced in the Eastern District of New York, while *Pearl* was pending. Upon final disposition of *Pearl*, the parties moved and cross-moved for summary judgment as to whether the Board's plan complied with the Establishment Clause, and the parties stipulated that the record of *Pearl* would be part of the record in this action. JA 287-288. The District Court, in a memorandum order dated October 4, 1983, adopted the opinion of the three-judge court in *Pearl* and granted summary judgment to defendants. JA 287-289. The District Court specifically noted that the record demonstrated that the Board's Title I program had resulted in no unconstitutional mixing of government and religion. JA 288-289.

On plaintiffs' appeal, the Court of Appeals reversed and granted summary judgment to plaintiffs. *Felton v. Secretary of Educ.*, *supra*, 739 F.2d 48. While the Court recognized the effectiveness of the Board's Title I program, that the Board had been successful in keeping its professionals from giving sectarian instruction, and that any off-site program would be

either more costly or less effective, the Court found that the Board's program violated the Establishment Clause as constituting an excessive entanglement of Church and State. *Id.*, p. 49-50, 69-72.

This Court, treating the defendants' appeal as a petition for certiorari, granted the petition and, by a 5-4 decision, affirmed the Second Circuit's grant of summary judgment to plaintiffs. *See Aguilar v. Felton*, 473 U.S. 402 (1985). The Court reasoned that the presence of Board employees in religious schools "require[d] a permanent and pervasive state presence" in religious institutions. *Id.* at 413. The Court premised its finding of unconstitutionality solely on the ground of excessive entanglement, although in the companion case of *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) the Court invalidated state programs on the ground of impermissible religious effect without explicitly deciding the entanglement issue. *Id.* p. 397, n.14. In *Aguilar*, the Court found an excessive entanglement in the very supervisory system adopted by the Board to prevent the inculcation of religious beliefs, as well as in the cooperative efforts between the Board's administrative personnel and teachers and their private school counterparts. 473 U.S. at 409, 412-14.

The majority opinion in *Aguilar* prompted several dissenting opinions. Former Chief Justice Burger remarked that "today's decision will deny countless schoolchildren desperately needed remedial teaching services." *Aguilar*, 473 U.S. at 419, (Burger, C.J. dissenting). He further noted that "[w]hat is disconcerting about the result reached today is that, in the face of the human cost entailed by this decision, the Court does not even attempt to identify any threat to religious liberty posed by the operation of Title I." *Id.* Likewise, then-Justice Rehnquist opined that "[t]he Court today strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low-income families. The Establishment Clause does not prohibit such sorely needed assistance . . . ." *Id.* at 421 (Rehnquist, J. dissenting).

In her dissent, Justice O'Connor extensively reviewed the Board's Title I program, and found that "[t]he abstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York City." *Aguilar*, 473 U.S. at 424, (O'Connor, J. dissenting). She then concluded that

> the Court's decision is tragic. The Court deprives [New York City schoolchildren] of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory and the analysis . . . on which it is based. I cannot close my eyes to the fact that, over almost two decades, New York City's public school teachers have helped thousands of impoverished parochial schoolchildren to overcome educational disadvantages without once attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause.

Id. at 431.

The Board's post-Aguilar Title I program

On remand, the District Court entered a judgment, dated September 26, 1985, which included an injunction enjoining the Secretary of Education and the Chancellor of the Board of Education from using public funds for a Title I program to the extent it requires or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools. A 22-26. The judgment, entered on the Court's decision in *Aguilar*, provided for a stay of its effect until the start of the September 1986 school year to provide the Chancellor with an opportunity to comply with its requirements. A 26. The judgment was affirmed by the Court of Appeals. *Felton v. Secretary, United States*

Department of Educ., 787 F.2d 35 (2nd Cir., 1986). Since 1986, the Chancellor and the Board have sought to provide the Title I services through alternative means, which have proven to be both less effective and more expensive than the on-site program which existed for almost 20 years prior to *Aguilar*.

The Board has used four alternative methods of providing Title I services to private school children, which in the 1984-85 school year had included approximately 22,000 students, the great majority being parochial school students. JA 313, JA 314-315. After *Aguilar* there was a drop-off in private school participation, but by 1993-94, the number again approached 22,000, out of a total New York City Title I population served, in both public and private schools, of approximately 260,000. JA 310, JA 334.

The alternatives are public school sites, leased sites, Mobile Instruction Units ("MIU's"), and Computer Assisted Instruction ("CAI"). Because of severe overcrowding at the Board's public schools as a result of a growing public school population, as well as problems caused by travel between the private and public schools, the use of public school sites has decreased so that while in 1985/86 approximately 3500 private school students obtained Title I services at public school sites, by the 1993-94 school year, approximately 1200 students received services at public school sites. JA 316-318. Furthermore, the expected drop in private school participation in the Title I program after *Aguilar*, was at least partly attributable to dissatisfaction with the public school sites. JA 317-318, JA 711-712. The leased sites have been a limited resource for Title I services due to the unavailability of appropriate sites. JA 323-325 . In 1993-94, approximately 1600 private school students received their Title I services on leased sites. JA 325. Private school students who receive their services at public school sites and leased sites often spend considerable time travelling between their regular school and the public school or leased site; this loss of instructional time is particularly unfortunate for Title 1 students, who by definition are in need of instruction. JA 329-330.

The remaining two alternatives, which the Chancellor has been forced to use, are Mobile Instruction Units and Computer Assisted Instruction. Both are unsatisfactory. An MIU is really an expensive bus turned into a classroom, JA 465-467, while CAI is a depersonalized, electronic teacher. In 1986-87, approximately 3500 private school students were receiving their Title I services in MIU's; by 1993-94, approximately 11,600 students, or more than half of the private school students receiving Title I assistance in New York City, received them in MIU's. JA 310, JA 323.

The MIUs are very expensive. The Board leases MIUs from a private company, at an annual cost in excess of $100,000 per vehicle. JA 338. The total cost for leasing MIUs through the first 8 years of the post-*Aguilar* program was $83,729,440. JA 336, JA 345. In 1994-95, the Board leased 126 MIU's. JA 322-323. The contract requires the MIU supplier to provide garage, maintenance, repair, cleaning, and insurance for the MIU. JA 321. The supplier must also provide a driver who remains at the MIU during the school day to provide security. JA 321.

In order to maximize the efficient use of MIUs, each vehicle contains a folding partition. When the partition is closed, one section of the MIU can accommodate a class of up to 10 students, which is the maximum class size with one teacher permitted under the New York State Education Department ("SED") Guidelines. The smaller section can be used for activities such as counseling, "English as a Second Language" classes, parent-teacher conferences, or staff conferences. JA 320.

MIUs lack many of the amenities which are accessible in the traditional school environment. First, MIUs lack telephone services. Each vehicle is equipped with a walkie-talkie, which is used in case of an emergency. Second, MIUs lack bathroom facilities. Third, due to safety considerations, windows in the MIU classroom area are small and covered with a heavy wire grid. Fourth, there is limited storage space for equipment and

supplies. Fifth, MIUs lack an external source of electrical power. JA 321-322.

During school hours, the MIU is parked on a public street near the private school. MIUs are not permitted to be parked on private school property. Instead, they are generally parked on the same block as or around the corner from the private school. JA 322. The children are thus forced to leave the school and go to the bus, highlighting that they are in need. This also disrupts their instructional time, particularly in the winter months when they must put on and remove their outer garment. JA 329-330. The MIU's cause additional problems for the Board's Title I professionals, most of whom are itinerants; in light of the limited storage space on the MIU's, they must frequently carry their records and files on a daily basis. JA 332-333.

The Board's final alternative means of supplying Title I services to the private school students is computer-assisted instruction, or "CAI." CAI provides private school students with Title I instruction via computers that are linked by modems or by dedicated telephone lines to a Board office. By 1994, 9,662 private school students were served by CAI; of those, 2,115 students received CAI services in conjunction with face-to-face services provided at either public school sites, leased sites or MIU's; this combination service was provided in response to Title I achievement tests which showed that students who receive their Title I services only by CAI do not as a group make as much educational progress as students who have the benefit of personal instruction by teachers. JA 325, 328-329.

The Board's Title I teachers are not present in the private school during CAI sessions. When students use the computers, their work product is transmitted electronically to a centralized Board office where Title I instructors monitor the students' work, report on their progress, and adjust each student's curriculum as appropriate. JA 335. The only Board employee who is present in the CAI room during Title I sessions is a CAI computer technician. JA 325-26.

Compliance with *Aguilar* has been very expensive. For the school years 1986-87 through 1993-94, the Board spent $93,245,424 for the additional costs of complying with *Aguilar*. JA 333, 344. $83,729,440 of that amount was spent in leasing MIU's. JA 336, JA 345. Under regulations promulgated by the Secretary of Education, the non-instructional administrative costs of complying with Aguilar must be taken "off the top" of the Local Educational Agency or LEA's total allocation of Title I funds. JA 335-336; A 157-158); 34 C.F.R. 200.27(c) (1996). Thus such costs of complying with *Aguilar* reduce the amount of Title I funds available for both public and private school students. Both the State of New York and Congress, in response to *Aguilar*, made funds available for such Aguilar-related capital expenses. JA 333-334. Furthermore, certain "carryover funds" were available from prior years because of the decrease of participation by private school students in New York City after *Aguilar*, JA 334, but state funds were eliminated in 1991, and the "carry-over" funds were almost exhausted at the time this motion was made. JA 335-336. For example, in 1995/96, the Board budgeted approximately 16 million dollars for such capital expenses of complying with *Aguilar* and was required to use almost 6 million dollars "off-the-top" of its Title I allocation for such expenses. JA 159.

Under the off-site program, coordination between the Board's Title I professionals and the private school staff is made more difficult. JA 331-332. They must consult with and coordinate their work with the private school staff. JA 331-332; JA 468, JA 471-473. 20 U.S.C., §§ 6315(c)(1)(C),(E), 6321(b); United States Department of Education, *Policy Guidance for Title I, Part A- Improving Basic Programs Operated by Local Educational Agencies* (April 1996), pp. 1-2. These consultations must be held off the site of the parochial school, in the MIU, or at the public school or leased site; consultation may also be by telephone. JA 331-332. For CAI, the consultation consists of the delivery of a computer-generated progress report to the private school principal. JA 332.

Compliance with *Aguilar* is a nationwide problem. In October, 1995, the Secretary of Education issued a statement in which he pointed out that hundreds of million of dollars had been spent by school districts to comply with *Aguilar*, and described *Aguilar* as having a "significant negative impact on Title I services for the neediest children in both public and private schools." A 157, A159. Secretary Riley called for reconsideration of *Aguilar* in an appropriate case. A 157, A161.

On June 7, 1995, the Board of Education passed a resolution authorizing their counsel to commence legal proceedings to seek reconsideration of *Aguilar*. In its resolution, the Board noted both the great financial costs and the educational disadvantages of the present means of delivering Title I services to private school students. JA 347-351. Thereafter, the Chancellor moved pursuant to Rule 60(b) for relief from the District Court judgment[3].

DECISIONS BELOW

Although the District Court recognized that the Board's present program of delivering Title I services to parochial school students constituted an "indisputably enormous expense," the Court denied the motion because *Aguilar* has not been explicitly overruled. A 11, 20. The Court, however, found that the Board and Chancellor had followed the proper procedure in moving under Rule 60(b), and that the motion should not be denied as untimely. A 14-20. The Court found that the use of Rule 60(b) struck the "proper balance between the conflicting principles that litigation should have finality and that justice should be done." A 16. Indeed, the Court noted that there "could scarcely be a more appropriate vehicle" for reconsideration of *Aguilar* than the same case in which the Board "is struggling with the consequences of ... [that] ... decision." A 21.

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[3] At the time of the Rule 60 (b) application, the Board was not a formal party to the action, By stipulation so ordered on May 6, 1996, the Board was added as a defendant. JA 756, JA 759.

On appeal, the Court of Appeals affirmed, substantially for the reasons stated by the District Court. A 5.

SUMMARY OF ARGUMENT

1. Rule 60(b) is an appropriate vehicle for petitioners to seek relief from the judgment which was entered upon the Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985) and which enjoins the petitioner Chancellor and the Secretary of Education from using public funds for a Title I program to the extent it requires or permits publicly-employed teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools.

a. Rule 60(b) explicitly empowers the District Court and, on review, this Court to relieve a party from the prospective application of a judgment where such application is no longer equitable. Such relief is appropriate where there has been a significant change in facts or law. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383-384, 388 (1992); *System Federation v. Wright*, 364 U.S. 642, 643-650 (1961). There has been a significant development in the Court's Establishment Clause jurisprudence sufficient to support such relief. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988).

b. Law of the case is a discretionary doctrine. *See Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992); *Arizona v. California*, 460 U.S. 605, 618 (1983). Discretion should be exercised in favor of reconsideration of *Aguilar* in this case, because of the significant developments in the Court's Establishment Clause jurisprudence, and because this case presents the best record for such reconsideration. Furthermore, petitioner Board of Education administers the largest Title I program in the nation, and should not be required to await reconsideration of *Aguilar* in litigation relating to another school district solely because it is subject to an outstanding injunction enforcing the holding of *Aguilar*.

2. The Court should overrule the holding in *Aguilar* that the Establishment Clause forbids the provision of Title I

special education services on the premises of sectarian schools attended by eligible students.

a. The holding in *Aguilar* that Title I special education services may not be provided on the premises of secular schools has resulted in less effective educational assistance at a substantially greater cost to the public fisc. It is inconsistent with the guiding principle of neutrality which has been most recently and relevantly expressed in *Zobrest v. Catalina Foothills Sch. Dist., supra,* 409 U.S. 1 and *Rosenberger v. Rector and Visitors of the University of Virginia,* ___ U.S. ____, 115 S.Ct. 1510 (1995).

b. This Court applied the relevant analysis in *Zobrest.* The Establishment Clause is not violated where public employees provide services on the site of a sectarian school, if they are provided pursuant to a government program which extends benefits to a broad class of citizens, defined without regard to religion. Under those circumstances, a mere indirect benefit will not invalidate the program. Under this analysis, a Title I program is not invalid because its services may be provided on the site of sectarian schools. Title I is a general program that provides benefits based upon educational and economic need, not on religion. The benefits are available whether the school attended by the eligible student is public, private or parochial. The provisions of Title I assure that the program is secular, and that any benefit to parochial schools is incidental. 20 U.S.C. §§ 6321(a)(2) and (c)(1), and 6322(b).

c. Assuming the three-pronged test of *Lemon v. Kurtzman,* 403 U.S. 602 (1971) remains valid, an on-site Title I program is legal under that test. Title I clearly has a secular purpose, and both the provisions of Title I, and the record of the Board's pre-*Aguilar* program, establish that any religious effect is incidental. As for entanglement, in light of the case-law since *Aguilar*, including *Zobrest* and *Bowen v. Kirkland, supra*, there is no excessive entanglement with religion. To hold otherwise is to violate the principle of neutrality toward religion and subvert the worthy goals of the Title I program.

ARGUMENT

POINT I

THE PETITIONERS PROPERLY INVOKED THE JURISDICTION OF THE DISTRICT COURT PURSUANT TO RULE 60(b). THE QUESTION OF THE CONTINUING VALIDITY OF *AGUILAR v. FELTON*, 473 U.S. 402 (1985) SHOULD BE CONSIDERED BY THE COURT.

In its order granting the petitions in this case, the Court directed the petitioners to brief and argue, in addition to the questions raised in the petitions, this question: "Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief petitioner seeks." Petitioners submit that Rule 60(b) is a proper vehicle for modification of the outstanding injunction, and that law of the case does not bar the Court from granting petitioners such relief.

Rule 60(b) provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment...."

Rule 60(b), and particularly its reference in subdivision 5 to the relief from a judgment with prospective application, is grounded in the familiar and long-standing equity principle that injunctive relief can be modified or vacated "when its continuance is no longer warranted." *Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, 298 (1941). As stated by Justice Brennan, "[I]t was the law long before the promulgation of Rule 60(b) that a change in the law after the rendition of a

decree was grounds for modification or dissolution of that decree as it might affect future conduct." *Polites v. United States*, 364 U.S. 426, 438 (1960) (dissent). This Court has recognized that where the circumstances supporting an injunction have changed, such as where the enjoined practice is no longer violative of a statute, the injunction may be modified. *System Federation v. Wright*, 364 U.S. 642, 643-50 (1961), quoting *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 430-432 (1855). Thus the Court has held that Rule 60(b) authorizes modification of a consent decree where there has been a significant change in circumstances, either of facts or law. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383-84 (1992).

Had this Court explicitly overruled *Aguilar* in some other case, we believe it clear that a Rule 60(b) motion would be the appropriate vehicle for the Chancellor and the Board (and presumably the Secretary of Education) to seek relief from the District Court injunction. *See System Federation v. Wright*, *supra*, 364 U.S. at 648. *Accord*, *Rufo*, *supra*, at 388 (consent decree may be modified where statutory or decisional law has made legal what decree was designed to prevent). It is submitted that denial of such an application would be an abuse of discretion, particularly in light of the factual record established by petitioners. Thus our application, whether or not *Aguilar* had yet been overruled, cannot be denied on Res Judicata principles of finality. The District Court, and this Court on review, had the clear power to entertain our application. *System Federatation* at 646. Furthermore, the circumstance that the case was previously reviewed by this Court does not bar Rule 60(b) relief. *Standard Oil Co. of California v. United States*, 429 U.S. 17 (1976) (Motion to recall Supreme Court mandate denied because District Court may decide Rule 60(b) motion without leave of Supreme Court).

Thus the constraint on this Court, other than stare decisis, is the law of the case doctrine. *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992), *Arizona v. California*, 460 U.S. 605, 618-619 (1983). While the cited cases are original jurisdiction cases where this Court has refused to "extrapolate wholesale

[the] law of the case [doctrine]," *Arizona v. California*, *supra* at p. 619, even in that situation the Court will overrule its prior ruling on a showing of changed circumstances of fact or law. *Wyoming v. Oklahoma*, *supra*, at 446.

Law of the case is a doctrine grounded in discretion, and does not limit the Court's power to reconsider an issue. *Wyoming v. Oklahoma*, *supra* at 446 ("Of course, we surely have the power to accede to Oklahoma's request at this late date....") There are numerous factors which counsel in favor of reconsidering *Aguilar* in this case. First, there have been significant developments in the law supporting that relief. *See*, *e.g. Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)(Government-funded sign-language interpreter may provide his services on the premises of a sectarian school); *see also Bowen* v. *Kendrick*, 487 U.S, 589, 615-617 (1988) (discussing entanglement). Indeed, the state of the law in the Second Circuit has so changed that it is now legal for a publicly-employed teacher to enter the premises of a parochial school to provide special education services for disabled students, *Russman v. Watervliet School District*, 85 F3d 1050 (2d Cir., 1996), *pet. for cert. pending*, docket 96-776, but it is illegal under *Aguilar* to send a publicly-employed teacher onto such premises to provide remedial services.

There are other reasons, both legal and practical, why discretion should be exercised to reconsider *Aguilar* in this posture. Five members of this Court have called for reconsideration of that decision, *see infra*, p. 24, and this case is a paradigm of a Title I program as it is and might be applied in private schools. The petitioners' school district is the largest in the nation with the largest Title I program, and within the City of New York is a substantial parochial school system with large numbers of children eligible for Title I services. JA 310, JA 659, JA 673. The record of the Board's past and present manner of delivering Title I services to parochial school students would provide the best backdrop for reconsideration of *Aguilar*. To deny review of the merits here would require the petitioners, and the Secretary of Education, to remain under the constraint of an injunction the legal basis

of which members of this Court have called into question, both by the various opinions in *Board of Educ. of Kiryas Joel* v. *Grumet*, -U.S.-, 114 S.Ct. 2481 (1994) and the grant of the petitions in this case. While the Court awaits another vehicle for reconsideration of *Aguilar*, one with a necessarily less extensive record comparing pre- and post- *Aguilar* programs, millions of dollars will be spent to comply with *Aguilar*. As the Secretary has pointed out, there could be significant delay and additional expense resulting from such litigation. There is also the complication that the Secretary, while continuing to enforce the decision in *Aguilar*, believes it to be unsound, and would not be an aggressive participant in such lower court proceedings. Brief for the Secretary of Education on Petitions for Writ of Certiorari, pp. 14-15, and n. 8.

A refusal to review the merits here would lead to the unfortunate result that the school district with the largest Title I program in the nation, and with a substantial private school component of that program, would be the only school district in this nation without an available remedy to seek reconsideration of *Aguilar*. The Court should exercise its discretion to reconsider the continuing validity of *Aguilar* in this case.

POINT II

AGUILAR v. FELTON, 473 U.S. 403 (1985) IS INCONSISTENT WITH THE ESTABLISHMENT CLAUSE JURISPRUDENCE OF THE COURT, AS STATED MOST RECENTLY IN *ZOBREST v. CATALINA FOOTHILLS SCHOOL DISTRICT*, 509 U.S. 1 (1993) AND *ROSENBERGER v. RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA*, __ U.S. __, 115 S. Ct. 2510 (1995). THE PETITIONERS' RULE 60(b) MOTION SHOULD BE GRANTED.

(1)

In *Aguilar*, this Court, by a 5-4 majority, struck down a program described by then Chief Justice Burger as one that

"has done so much good and little, if any, detectable harm." 473 U.S. at 420, quoting *Felton v. Secretary, United States Department of Education, supra*, 739 F.2d at 72 (2d Cir., 1984). Indeed, as Justice O'Connor stated, in the 19 years of the Board's on-site program, there had never been an incident in which a Title I instructor had even subtly attempted to indoctrinate a student in any religious tenet. 473 U.S. at 424. It was also clear at that time that the alternative methods of providing the Title I services would be more expensive and less effective than the on-site program. *Ibid.*

In *Board of Education of Kiryas Joel v. Grumet, supra*, 114 S.Ct. 2481, a case in which the Court struck down a special school district created in response to *Aguilar*, five members of the Court explicitly stated their wish to reconsider *Aguilar*. *Ibid.*, p. 2498 (O'Connor, concurring; "It is the Court's insistence on disfavoring religion in *Aguilar* that led New York to favor it here"); *Ibid.*, p. 2505 (Kennedy, concurring; "One misjudgment [in deciding *Aguilar*] is no excuse, however, for compounding it with another"); *Ibid.*, p. 2515 (Scalia dissenting, joined by Rehnquist and Thomas; "[*Aguilar* and *Grand Rapids*] should be overruled at the earliest possible moment.").

As petitioners have shown in their Rule 60(b) application, the mischief caused by *Aguilar* is not limited to the factual situation in *Kiryas Joel*. Compliance with *Aguilar* has forced petitioners to use alternatives which are less educationally effective than the on-site program, and at substantially increased costs. Hundreds of millions of dollars have been spent nationally to comply with *Aguilar*, and such sums could have been spent for worthier purposes, including the education of the nation's neediest children in both public and private schools.

This Court should now overrule *Aguilar* and restore the Court's Establishment Clause jurisprudence "to the proper track - government impartiality, not animosity toward religion." *Ibid.*, p. 2498 (O'Connor, concurring).

(2)

The Court's present Establishment Clause Jurisprudence is most aptly and relevantly set out in *Zobrest v. Catalina Foothills School District*, *supra*, 509 U.S. 1. In *Zobrest*, the Court held that the Establishment Clause was not violated by providing a publicly-employed sign-language interpreter to a deaf student attending a secular high school. Not only would the state-employed interpreter be in the religious school throughout the regular school day, but he or she would be required to communicate verbatim the material covered in religion class, daily Mass, and the "nominally secular subjects that are taught from a religious perspective." 509 U.S. at 19 (Blackmun, J., dissenting).

In speaking for the Court, Chief Justice Rehnquist stated the policy underlying the Court's analysis:

> We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). For if the Establishment Clause did bar religious groups from receiving general government benefits, then "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Widmar v. Vincent*, 454 U.S. 263, 274-275 (1981)(internal quotation marks omitted). Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

509 U.S. at 8.

The Chief Justice then analyzed the constitutionality of the services provided to the student in *Zobrest*:

> The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "disabled" under the IDEA, without regard to the "sectarian-nonsectarian, or public-private nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking. Viewed against the backdrop of *Mueller* and *Witters*, then, the Court of Appeals erred in its decision. When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," *Witters*, *supra*, at 488, it follows under our prior decisions that provision of that service does not offend the Establishment Clause. See *Wolman v. Walter*, 433 U.S. 229 (1977).

509 U.S. at 10

Thus under *Zobrest* the Establishment Clause is not violated where public employees provide services on the site of sectarian schools, if they are provided pursuant to a government program which neutrally extends benefits to a broad class of citizens, defined without regard to religion; a mere indirect or attenuated benefit to sectarian schools will not invalidate the program. *Zobrest*, *supra*, p. 10.

This approach of neutrality towards religion has been a dominant theme of this Court's Establishment Clause jurisprudence. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court rejected an Establishment Clause challenge to a state's provision of vocational rehabilitation assistance to a student attending a private Christian college and studying, *inter alia*, the Bible and

church administration in order to become a pastor, missionary or youth director. 474 U.S. at 483. In applying the *Lemon* test, the Court found there was no direct subsidy to the religious college. The rehabilitation benefits were part of a general program made available without regard to the nature of the institution attended; the aid went to the student, who made the choice to attend religious education. 474 U.S. at 487-489.

Neutrality toward religion was the central theme in *Mueller v. Allen*, 463 U.S. 388 (1983), where the Court upheld a Minnesota statute providing a limited tax deduction for tuition, textbooks, transportation and related expenses for taxpayers' dependents attending elementary and secondary schools. 468 U.S. at 391-392. Although these benefits were available to taxpayers whose dependents attended sectarian schools, the program was upheld. The Court found that the deduction was available to all parents, not simply those whose children attend sectarian schools, and any benefit flowing to sectarian schools was solely the result of the taxpayer's choice. *Id.*, pp. 395-399.

This neutrality principle has been a touchstone of the Court's Establishment Clause caselaw. *See e.g., Everson v. Board of Education.* 330 U.S. 1 (1947)(New Jersey statute authorizing local boards to reimburse parents of students attending all non-profit schools for fares for public transportation found constitutional; noting the friction between the Establishment and Free Exercise Clauses, the Court found the statute consistent with the First Amendment's policy of neutrality toward religious believers and non-believers); *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)(New York statute authorized local school authorities to lend non-religious textbooks to all students at certain grade levels, including students attending private schools; Court noted that the program provided to "all children the benefits of a general program to lend books free of charge"; *Board of Education v. Mergens*, 496 U.S. 226, 248 (1990)(Court upheld the Equal Access Act guaranteeing student religious groups equal access to secondary school facilities; Justice O'Connor, writing for plurality,

noted that discrimination against religious groups would show hostility rather that neutrality toward religion).

The neutrality principle has most recently been applied in *Rosenberger v. Rector and Visitors of the University of Virginia*, __ U.S. __, 115 S.Ct. 2510 (1995) wherein the Court held the university violated the free speech rights of the petitioner students when it refused to pay the printing costs of their student journal solely because it "promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." 115 S.Ct. at 2513. The Court found this to be impermissible viewpoint discrimination, relying, *inter alia*, on the holding of *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (Viewpoint discrimination to deny a request to use school facilities to show a film series on child-rearing questions when only reason for denial was that it expressed a Christian viewpoint). The Court addressed the analysis utilized by the Court of Appeals - that while refusing to pay the journal's printing costs violated the Free Speech Clause, such refusal was necessary to avoid violating the Establishment Clause through a monetary subsidy to a religious organization. 115 S.Ct. at 2521. In finding no Establishment Clause violation, Justice Kennedy, writing for the Court, stated:

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion . . . . We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.

Id. at 2521 (citations omitted).

The Court then turned to a discussion of the university's program, and continued its emphasis on neutrality.

> The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the [Student Activities Fund] is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. . . . The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was.

Id., at 2522.

The Court also found the principle of neutrality forwarded by the university's explicit disassociation from the views of the various student societies and publications which received funding. *Id.*, p. 2523. The Court found the payment of printing costs indistinguishable from the provision of school facilities, and relied on its holding in *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) that a public university may constitutionally grant access to its facilities on a religiously-neutral basis to a wide spectrum of student-groups, including groups which use meeting rooms for sectarian activities, including some devotional exercises. *Id.*, p. 2523. The Court further found that any benefit to religion is solely "incidental to the government's provision of secular services for secular purposes on a religious-neutral basis." *Id.*, p. 252. Accordingly, the Court found that the Free Speech Clause mandated, and the Establishment Clause did not preclude, the reimbursement of the magazine-printing costs.

Guided by the principle of neutrality, and specifically applying the analysis in *Zobrest*, it is submitted that the holding in *Aguilar* was wrong and that the Board's on-site Title I program fully comported with constitutional requirements. Title

I, like the IDEA in *Zobrest*, is a general government program that distributes benefits neutrally to any child without regard to the nature of the school he or she attends; a child's eligibility is determined by educational and economic disadvantage, not by religion or the religious nature of the school attended. 20 U.S.C., §§ 6313, 6315(b). Title I mandates that eligible students attending private schools, parochial or otherwise, receive services that are "equitable" in relation to that given to public school students. 20 U.S.C. § 6321(a)(3); 34 C.F.R. 200.10-11 (1996). As the Title I benefits are available whether the student attends public, private, or parochial school, the Board of Education employee is present on the site of the parochial school as a result of the private decision made by the parents to send the child there. 509 U.S. at 10. Thus there is no financial incentive for the parent to choose the sectarian school. *Id.*

As in *Zobrest*, any economic benefit to the parochial school is, at most, indirect and highly speculative. *Id.*, pp. 10-11. Title I assures that there is no direct benefit to the parochial school; all services and material provided with Title I funds must be secular, neutral and nonideological, and the control of all funds and title to all equipment must be in a public agency. 20 U.S.C. § 6321(a)(2) and (c)(1). Title I funds must be used to supplement, not supplant, the private school student's classroom work, and the Secretary's regulations specifically mandate that Title I funds not be used for the needs of the private school or the general needs of children in a private school. 20 U.S.C. § 6322(b); 34 C.F.R. 200.12(b) (1996). Under the circumstances, any benefit to a parochial school is "incidental," *see*, *Widmar v. Vincent*, *supra*, 454 U.S. at 273-274 and "attenuated." *Witters v. Wash. Dept. of Services for Blind*, *supra*, 474 U.S. at 488. As in *Zobrest*, the Board's on-site program results in no direct subsidy to the sectarian schools, as was found in *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Grand Rapids School District v. Ball*, *supra*, 473 U.S. 373. The aid is given to the individual child in need of special education assistance, not the parochial school he or she happens to attend. 509 U.S. at 13-14.

(3)

Recent Establishment Clause cases have been marked by the Court's failure to apply the *Lemon* test. *See e.g.*, *Zohrest v. Catalina Foothills School District*, *supra*, 409 U.S.1; *Rosenberger v. Rector & Visitors of Univ. of Va.*, *supra*, 115 S. Ct. 2510; *see also Board of Educ. of Kiryas Joel v. Grumet*, *supra*, 114 S. Ct. 2481. However, the *Lemon* test has not yet been explicitly overruled by the Court. *See*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, *supra*, 508 U.S. at 395, n.7. Assuming the *Lemon* test retains any viability, it cannot be applied, consistently with the Court's more recent Establishment Clause jurisprudence, to invalidate an on-site Title I program like the Board's pre-*Aguilar* program.

There is no serious doubt that the Congress' purpose of assisting economically and educationally deprived children is a proper secular purpose. *See Wheeler v. Barrera*, 417 U.S. 402, 405-06 (1974), *mod.*, 422 U.S. 1004 (1975). Likewise, as we show in subpoint 2, any religious effect is merely incidental, not primary. *Zobrest*, *supra*, at 12. This is confirmed by the Board's almost 20 year history of maintaining the secular nature of its on-site program.

The final prong, whether the government is excessively entangled with religion, was the sole basis for the finding of unconstitutionality in *Aguilar*, 473 U.S. at 409-414. However, since *Aguilar*, this Court's Establishment Clause jurisprudence has substantially changed, including its entanglement analysis. *Zobrest*, *supra*; *Bowen v. Kendrick*, *supra*, 487 U.S. 589.[4] To invalidate a religiously-neutral program such as an

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[4] In *Bowen*, this Court rejected an Establishment Clause attack on the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300Z, *et seq*. In considering the facial attack on the statute, the Court applied the *Lemon* test. The Court found a secular purpose (487 U.S. at 602-609), and that any religious effect was merely incidental, even though Congress determined that religiously-affiliated organizations would be among those organizations providing services and therefore receiving federal grants under the legislation. *Id.*, pp. 605-609.

(Footnote continued)

on-site Title I program on the grounds of entanglement is at odds with this Court's guiding principle of neutrality toward religion. This is particularly true where, as in *Aguilar*, a primary source of the "entanglement" arises from the supervision by one group of public employees (Title I supervisors) of the work of other public employees (Title I teachers). 473 U.S. at 413. Under *Aguilar*, a religiously-neutral government program must be invalidated solely because of good-faith efforts by public officials to assure such neutrality. This "Catch-22" reasoning is no longer valid. *Bowen v. Kendrick*, *supra*. To hold otherwise would subvert the laudable goals of Title I. *Aguilar v. Felton*, *supra*, 473 U.S. at 420-21 (Rehnquist, dissenting).

The Court's finding as to entanglement is particularly relevant. The Court found no entanglement although it recognized that federal employees might visit the clinics and offices where the services were being carried out by, among others, religiously-affiliated organizations, to assure compliance with statutory and constitutional guidelines. *Id.*, pp. 615-617. The Court described the argument that such monitoring constitutes an entanglement as a "Catch-22" argument. *Id.*, p. 615.

CONCLUSION

THE ORDER OF THE COURT OF APPEALS SHOULD BE REVERSED SO AS TO GRANT THE PETITIONERS' RULE 60(B) MOTION AND VACATE THE INJUNCTION.

Respectfully submitted,

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Nos. 96-552 and 96-553

In the Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

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QUESTIONS PRESENTED

1. Whether the Court should overrule its decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

2. Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief petitioners seek.

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BRIEF FOR THE SECRETARY OF EDUCATION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 11a-13a)[1] and the district court (Pet. App. 1a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1996. The petitions for a writ of certiorari were filed on October 7, 1996, and were granted on January

[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 96-552.

17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion."

2. Federal Rule of Civil Procedure 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment, order, or proceeding for the following reasons: * * * (5) * * * it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

STATEMENT

1. This case involves a federally funded program to provide remedial instruction and support services to needy elementary and secondary school students. See 20 U.S.C. 6301 *et seq*. To qualify for assistance under the "Title I" program,[2] a student must reside within the attendance

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[2] The program at issue was originally known as "Title I," because it was first enacted as Title I of the Elementary and Secondary Education Act of 1965. In 1981, Congress enacted Chapter 1 of the Education Consolidation and Improvement Act, Pub. L. No. 97-35, Tit. V, Subtit. D, 95 Stat. 357, 464, as a continuation of Title I, and the program became known as "Chapter 1." See *Aguilar* v. *Felton*, 473 U.S. 402, 404 n.1 (1985) (discussing the program's earlier history). In 1988, Congress enacted a new version of the program in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §§ 1003(a), 6303(a), 102 Stat. 431. Effective July 1, 1995, the Chapter 1 program again became known as "Title I," pursuant to the Improving America's Schools Act

boundaries of a public school located in a low-income area, and must be failing, or at risk of failing, the State's student performance standards. 20 U.S.C. 6313, 6315(b). Title I funds may be used only to supplement, and not to supplant, the students' regular classroom instruction. 20 U.S.C. 6322(b); 34 C.F.R. 200.12(a).

Local educational agencies (LEAs) that receive federal Title I funds must provide Title I services "equitabl[y]" to students in secular and religious private schools as well as public school students. See 20 U.S.C. 6321(a) and (d); 34 C.F.R. 200.10-200.11.[3] Expenditures for services to private school children must be equal to the proportion of funds allocated to participating public school attendance areas for low-income children attending private schools. 20 U.S.C. 6321(a)(4), 6313(c). When used for students in private schools, Title I funds may be used only to meet the needs of the students, and not the "needs of the private school" itself. 34 C.F.R. 200.12(b).[4]

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of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3519. The most recent legislation made substantive changes in the program, but none of those changes materially affects the issues in this case.

[3] If state or local law prohibits the LEA from providing "equitable" services to students in private schools, then the Secretary of Education shall arrange for the direct provision of services to such students. 20 U.S.C. 6321(d).

[4] Title I states that federal funds may be used for schoolwide improvements when "the school serves an eligible school attendance area in which not less than 50 percent of the children are from low-income families" or "not less than 50 percent of the children enrolled in the school are from such families." 20 U.S.C. 6314(a)(1)(B). The Department of Education has interpreted that provision to apply only to public schools; the Department's current regulations and policy guidance make clear that no religious school may participate in the schoolwide improvement provisions of the current law. See 34 C.F.R. 200.12(b) ("An LEA shall use funds under this subpart to meet the special educational needs of participating private school children, but

All Title I services provided to children in private schools must be "secular, neutral, and nonideological." 20 U.S.C. 6321(a)(2). Further, Title I services for private school children may be provided only through public employees, or through other persons independent of the private school and of any religious organization in the provision of those services. 20 U.S.C. 6321(c)(2). Funds for services to private school children must remain under the control of a public agency, and no funds may be provided to any private school. 20 U.S.C. 6321(c)(1). Private school officials are consulted in the design and development of Title I services for private school children, 20 U.S.C. 6321(b), but public school officials "make the

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not for * * * [t]he needs of the private school * * * or * * * [t]he general needs of children in the private school."); see also U.S. Department of Education, Office of Elementary and Secondary Education Compensatory Education Programs, Tit. I, Pt. A Policy Guidance, "Improving Basic Programs Operated By Local Educational Agencies" (Apr. 1996), Providing Services to Eligible Private School Children, at 13 (Policy Guidance) ("Because private schools are not eligible for Title I services [only their eligible children are], schoolwide programs may not be operated in private schools.") (App., *infra*, 1a-2a). A similar provision permitting federal funds to be used for schoolwide improvements was added to the statute in 1978. See Education Amendments of 1978, Pub. L. No. 95-561, § 133, 92 Stat. 2176; see also Education Consolidation and Improvement Act of 1981, Amendment, Pub. L. No. 98-211, § 3, 97 Stat. 1414 (1983). The Department of Education informs us that it never permitted religious schools to take advantage of the schoolwide improvement provisions of the old law.

We have lodged with the Clerk and served on the parties a copy of the Department of Education's current policy guidance on programs under Title I, Part A of the Elementary and Secondary Education Act, as amended. We have also lodged and served copies of the 1993 Department of Education assessment of Title I services delivered to nonpublic school students and the 1989 General Accounting Office study of the costs of compliance with *Aguilar*, discussed at pp. 37-39, *infra*.

final decisions with respect to the services to be provided to eligible private school children," 34 C.F.R. 200.11(b)(3).

2. In 1978, respondents[5] brought this action to challenge, as violative of the Establishment Clause of the First Amendment, the use of Title I funds to pay the salaries of public school teachers to provide secular remedial instruction to religious school students in their own schools. This Court held that such use of Title I assistance did violate the Establishment Clause, because of the risk of entanglement between government and religious authorities. *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

The Court noted that "[t]he professionals involved in the program are directed to avoid involvement with religious activities * * * and to bar religious materials in their classrooms," and that "the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols." 473 U.S. at 407. The Court held, nonetheless, that the public school system's supervisory efforts necessary to ensure that the instruction retained a purely secular content "inevitably results in the excessive entanglement of church and state." *Id.* at 409. The Court concluded that "[a]gents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes," and "the religious school must obey these same agents when they make determinations as to what is and what is not a 'religious symbol' and thus off limits in a Title I classroom." *Id.* at 413.

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[5] The Secretary of Education is also a respondent in this case under this Court's Rule 12.6, but he supports the position of the petitioners. Therefore, our references herein to "respondents" are to the private respondents.

On remand from this Court, the district court entered an injunction prohibiting the Secretary of Education and the Chancellor of the Board of Education of the City of New York from using Title I funds for instructional and counseling services inside religious schools. Pet. App. 14a-16a. It is that injunction from which petitioners sought relief under Rule 60(b) of the Federal Rules of Civil Procedure.

3. After this Court's decision in *Aguilar*, local school districts adjusted their practices to continue providing Title I services to private religious school students, albeit in settings other than inside religious schools. School districts have provided Title I services to religious school students in public school classrooms, at leased sites, through computer-assisted instruction, and in mobile units parked near or on religious school property. The Secretary of Education has required that school districts pay for the administrative costs of such alternative delivery systems from their Title I funds before using any such funds for core instructional and counseling services. See 34 C.F.R. 200.27(c).[6]

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[6] Both the alternative delivery methods and the Secretary's requirement that costs for compliance with the Court's decision in *Aguilar* be paid for "off the top" of Title I funds have been upheld against several statutory and constitutional challenges. See *Pulido* v. *Cavazos*, 934 F.2d 912 (8th Cir. 1991); *Barnes* v. *Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Board of Educ. of Chicago* v. *Alexander*, 983 F.2d 745 (7th Cir. 1992); *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995). Many of the same practices upheld in the foregoing cases now exist in New York City, see 96-553 Pet. App. A43-A70, ¶¶ 24-77, and were upheld against constitutional challenge in *Committee for Public Education and Religious Liberty* v. *Secretary, United States Department of Education*, 942 F. Supp. 842 (E.D.N.Y. 1996). Unrelated challenges to the City's provision of other forms of educational aid to private school children are still pending in the district court in that case.

The economic costs of delivering Title I services to students enrolled in religious schools at sites other than the religious schools themselves are considerable. The Secretary of Education has expressed concern that school districts "have expended hundreds of millions of dollars on non-instructional costs in order to comply with [the Court's decision in *Aguilar*]," Pet. App. 18a, and that New York City was required in one fiscal year alone to spend $6 million on compliance that could otherwise have been used for the core instructional and counseling purposes of Title I, *ibid.* The Secretary has also noted that, although Title I services have been provided to religious school students, since *Aguilar*, through "computer-assisted instruction in private schools and, in appropriate circumstances, parking mobile vans on or near private school property," *id.* at 18a-19a, there has been criticism that "even the alternative arrangements that have developed as a result of [*Aguilar*] are not the most educationally effective methods for providing Title I services," *id.* at 19a. The Secretary of Education therefore supported efforts to have the *Aguilar* decision reconsidered. *Ibid.*

4. In October and December 1995, petitioners filed motions under Federal Rule of Civil Procedure 60(b) for relief from the injunction entered by the district court on remand from this Court. The district court denied the motions. Pet. App. 1a-10a.

The district court first ruled that a Rule 60(b) motion was a proper mechanism for petitioners to present their request for relief from the September 1985 injunction. Pet. App. 7a-10a. The court acknowledged that "Rule 60(b) may not be used as a substitute for appeal," but it found it "plain" that, in this case, a Rule 60(b) motion "does not offend that rule." *Id.* at 7a. After discussing the separate views of several Justices of this Court about *Aguilar* expressed in *Board of Education of Kiryas Joel Village*

School District v. *Grumet*, 512 U.S. 687 (1994), the district court observed that "it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now." Pet. App. 7a-8a. In such extraordinary circumstances, the district court concluded, allowing petitioners "to resuscitate pursuant to Rule 60(b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done." *Id.* at 8a.

Addressing the "law of the case" doctrine, the district court noted that courts may depart from that rule for a "compelling reason" such as an "intervening change of law." Pet. App. 8a. The court thus accepted that, if petitioners were able to show "a sea change in the law" since this Court's decision in *Aguilar*, the law of the case doctrine would not preclude relief under Rule 60(b). *Ibid.* The court found further that the motion was not untimely, and that respondents would not suffer any cognizable prejudice as a result of any delay in bringing the Rule 60(b) motion. *Id.* at 8a-9a. And the court expressly found that a motion for relief from the injunction was "far preferable" to requiring the school district to challenge the judgment by placing itself in contempt by disobeying the injunction. *Id.* at 9a.

Ultimately, however, the court declined to afford petitioners relief from the judgment. The court observed that "[t]here may be good reason to conclude that *Aguilar*'s demise is imminent, but it has not yet occurred." Pet. App. 10a. The court also found it doubtful that it could properly anticipate any such decision by this Court to reverse its own decision in this case. *Ibid.* The district court suggested, however, that "there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is

struggling with the consequences of the Supreme Court's decision." *Ibid.*

The court of appeals affirmed, in a summary order, "substantially for the reasons" stated in the district court's decision. Pet. App. 13a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federally funded Title I education program is at the heart of the Nation's commitment to equal educational opportunity. That program establishes a federal-state partnership to lift the educational attainment of children in low-income areas who are failing, or at risk of failing, a State's student performance standards, by giving those students supplementary educational services. Congress required local educational agencies (LEAs) that receive Title I funds to offer Title I services "equitably" to students in both public and nonpublic schools. The judgment of most school administrators, as well as the Secretary of Education, is that the most educationally sound and cost-efficient method of delivering such services to religious school students (as with public school students) is to do so in their own schools.

That sensible and effective method of delivering Title I services to students in religious schools, however, has been foreclosed since this Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985). Even though Title I services must be secular and neutral, must be delivered to students in all cases by public employees (not religious school teachers), and must be designed to supplement, and not supplant, the nonpublic school's instructional program, the Court concluded in *Aguilar* that the very safeguards established to prevent any use of Title I services to advance religion themselves created a risk of "entanglement" of church and state. As a result, LEAs serving children enrolled in religious schools are required to

spend substantial sums on less effective, improvised methods of instruction, such as computer-assisted instruction, instruction at public schools where the students have been transported, or teaching in "mobile" sites such as rented vans. The money spent on administering these alternative delivery systems is money that would be available for direct instruction for both public and private school students, but for the *Aguilar* decision.

Our submission is straightforward: *Aguilar* should be overruled because there is no serious danger of entanglement of church and state when public school teachers deliver secular services to students in a supplementary program under circumstances carefully designed to ensure that the instruction is not influenced by the surroundings of a religious school. Overruling *Aguilar* is consistent with principles of *stare decisis*, because that decision is inconsistent with the bulk of the Court's entanglement jurisprudence and has significant costs. Further, this case is an appropriate vehicle in which to reconsider *Aguilar*, because this Court has the authority to reexamine that decision on review of the lower courts' denial of motions for relief from judgment under Federal Rule of Civil Procedure 60(b). Principles of finality of judgments do not deprive this Court of the authority to reconsider its earlier decision when a prospective injunction remains in effect. And although we would not lightly suggest to the Court that it depart from its own law of the case, we believe that, in light of the serious, adverse effect on equal educational opportunity occasioned by *Aguilar*, there is a compelling case for overruling that decision here.

I. A. The decision in *Aguilar* reflected an approach to the problem of entanglement that was not consistent with most of the Court's previous decisions on that question. In cases such as *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Hunt* v.

McNair, 413 U.S. 734 (1973), and *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), the Court had emphasized that government is not forbidden from cooperating with religiously affiliated institutions to accomplish secular objectives. When government does work with such institutions, there must be some method of ensuring that government does not lend its aid to the advancement of religious doctrine, but the government does not necessarily enmesh itself with the affairs of a church merely because it attempts to keep its own program secular in the context of such cooperation. Certainly there is no reason to presume that the government will disregard or fail at its constitutional obligations. Rather, the danger of such entanglement must be affirmatively shown in the record or found to arise because of the inherent nature of the specific church-state relationship at issue. For even when church and state cooperate, the government will often be able to keep the two separate through routinized and readily administered methods requiring no intrusive or continuing supervision of a religious institution. This is such a case.

B. The Court in *Aguilar* held, to the contrary, that an impermissible risk of entanglement would be present if public school teachers delivered supplementary secular educational services inside religious schools. The Court concluded that the oversight of Title I teachers necessary to insulate their teaching from the influence of the surrounding religious school would create excessive entanglement. The Court also stated that the administrative contacts between public and religious school personnel necessary to operate the program would be impermissibly entangling. Those conclusions were incorrect and stemmed from an analytical approach that was not consistent with the more practical and restrained approach reflected in virtually all of the Court's other decisions.

The administrative contacts between public and religious school personnel involved in the operation of the Title I program are only the routine contacts necessary to make the program function effectively as an educational program, no more extensive than the kinds of contacts the Court had previously held to be constitutional. Moreover, such contacts are necessary even when religious school children receive Title I instruction in public school classrooms, which is plainly constitutional.

The oversight of public school teachers delivering Title I services also presents no danger of entanglement. The Establishment Clause does not prevent public school administrators from supervising their own personnel to make sure that public instruction remains secular, whether inside or outside a religious school. Because Title I services are delivered only by public personnel, there is no basis for a concern that the public schools will become involved in supervising the content of the *religious* school's curriculum or the manner in which that curriculum is delivered by *religious* school teachers. And unlike the *Lemon* case, which involved state aid to religious school teachers, there is also no reason to hypothesize that public school teachers under strict secular control will become influenced, wittingly or unwittingly, by the surroundings of a religious school so as to give their instruction a sectarian tinge.

The program invalidated in *Aguilar* was similar to the program invalidated in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), but the analytical approach in *Meek* is also inconsistent with most of the Court's decisions. *Meek* need not, however, be read as establishing a rigid rule against instruction by public school teachers inside religious schools. *Meek* is also distinguishable on its facts, for the program at issue there lacked Title I's extensive guidance safeguards. Should the Court disagree, however, that

Meek is distinguishable, it should also overrule that portion of *Meek* that is relevant to this case.

C. Since *Aguilar*, the Court has returned to its previous practical and restrained approach to entanglement claims. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Court, in rejecting an Establishment Clause challenge to a federal statute permitting grants to religiously affiliated institutions but providing for supervision to ensure that the grants were not used for sectarian purposes, stressed that the situation had not been shown to involve any significant danger of entanglement in the course of such supervision. *Id.* at 615. In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), the Court upheld the use of public funds to pay for a sign-language interpreter to accompany a deaf child in classes at a Catholic high school, and rejected a broad reading of *Meek*, stating that there is "no absolute bar to the placing of a public employee in a sectarian school." *Id.* at 12-13. Finally, in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994), five Justices joined separate opinions criticizing the *Aguilar* decision and suggesting that it should be reconsidered. Those post-*Aguilar* decisions indicate that *Aguilar* is not consistent with the Court's Establishment Clause jurisprudence, and should be overruled.

D. The lack of any real danger of entanglement in Title I stands in sharp contrast to the serious, adverse consequences to equal educational opportunity that *Aguilar* has engendered. The Department of Education, the General Accounting Office, and House and Senate Committees have all concluded that *Aguilar* requires school districts to spend considerable sums on administrative costs made necessary only by *Aguilar*, sums that would otherwise be available for instructional purposes. Further, the alternative instructional methods available for nonpublic school

children after *Aguilar* (mobile site instruction, computer instruction, transportation to public schools) are all less effective than face-to-face instruction at their own schools. Those costs are not required by the Establishment Clause, and their serious consequences for education in this country provide a compelling case for overruling *Aguilar*.

II. Federal Rule of Civil Procedure 60(b) is a proper vehicle for petitioners to obtain relief from the district court's injunction based on this Court's decision in *Aguilar*. Rule 60(b) incorporates a well-established exception to the principle of finality of judgments, permitting a court to vacate a prospective injunction based on changes in the governing law. While the lower courts in this case were bound to follow this Court's controlling decision in *Aguilar*, this Court is not so bound and may reconsider its decision on review of the lower courts' correct refusal to depart from *Aguilar*. Further, this Court's reexamination of *Aguilar* on review of the denial of a Rule 60(b) motion may be the only practical and suitable means for reconsideration of that decision, since all lower courts are in any case bound by that decision, and the other possible mechanisms for this Court to reconsider the case all have serious defects. There is little reason for concern that use of the Rule 60(b) mechanism in this case will lead to abuse in future cases, because meritless attempts to gain reconsideration of precedent will be answered appropriately. And, in this case, the record presented to the courts below in the context of petitioners' Rule 60(b) motions is adequate to permit reconsideration of *Aguilar*.

ARGUMENT

I. *AGUILAR* v. *FELTON* SHOULD BE OVERRULED.

The decision to overrule a precedent of constitutional law is, of course, not to be taken lightly, particularly in an area as sensitive as that of the Establishment Clause. In our view, however, there is a compelling case for the Court to reverse its decision in *Aguilar* v. *Felton*. The outcome in *Aguilar* was not dictated by the Court's prior decisions in the area. Indeed, that decision's reliance on hypothetical concerns about the need for intensive supervision to ensure the secularity of a publicly administered program—concerns that had never arisen in years of actual administration of Title I in New York City—was inconsistent with most of the Court's prior entanglement decisions, which had stressed the need for a careful and "real world" evaluation of the administration of any program involving public aid to students at religiously affiliated educational institutions. *Aguilar*'s approach is also inconsistent with subsequent decisions of this Court, which have returned to that more practical and restrained approach. The consequences of the *Aguilar* decision are, moreover, very serious. In the judgment of the Secretary of Education, the less effective pedagogical methods available for private school students (such as teaching in rented vans, or remote computer-assisted instruction) and the large financial costs incurred in those methods have had a serious, adverse effect on the ability of students, at both public and private schools, to receive the needed remedial educational aid. See Pet. App. 17a-19a.

Accordingly, our submission is straightforward: *Aguilar* v. *Felton* should be overruled. *Aguilar* is an outlier in this area of constitutional law, not consistent with the

general thrust of the Court's other precedents in this field. No broad-ranging reconsideration of the Court's Establishment Clause decisions is necessary in order to overrule *Aguilar*, even on the narrow issue of "entanglement."

Our submission is consistent with the Court's long-standing approach to *stare decisis* in constitutional cases. Even as the Court has emphasized that adhering to precedent "'is usually the wise policy,' * * * when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). The same is true when a decision has been "bypassed by later decisions," see *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848, 861 (1996), or when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," *Planned Parenthood* v. *Casey*, 505 U.S 833, 855 (1992). Those circumstances are present here, for *Aguilar* rested on an approach to the problem of entanglement that (mistakenly, in our view) took little account of the real facts of the case, and failed to give adequate consideration to the substantial educational and economic costs of the decision. In those respects, *Aguilar* was a marked departure from the principal thrust of the Court's entanglement decisions. Cf. *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1127-1128 (1995). And there is no reliance interest counseling continued adherence to *Aguilar*, for it is not the kind of decision that leads to private commercial ordering, the development of personal and social relationships, or patterns of "thinking and living." Cf. *Casey*, 505 U.S. at 856. Accordingly, *stare decisis* does not prevent the overruling of *Aguilar*.

A. The Court's "Entanglement" Jurisprudence Before *Aguilar* Required A Real, Rather Than Hypothetical, Danger Of Surveillance Of Religious Institutions By Governmental Authorities To State An Establishment Clause Violation

Under *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), governmental action is consistent with the Establishment Clause if: (1) it has a secular legislative purpose; (2) it has a principal or primary effect that neither advances nor inhibits religion; and (3) it does not require excessive government entanglement with religion. In *Aguilar*, the Court held that the challenged aspects of the Title I program violated the Establishment Clause with respect to the third prong, "excessive entanglement." 473 U.S. at 409-414. In our view, that decision cannot now be reconciled with the Court's Establishment Clause jurisprudence, and should be overruled.[7]

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[7] It is indisputable that Title I has a secular purpose, and respondents have not argued otherwise. See *Aguilar*, 473 U.S. at 423 (O'Connor, J., dissenting) ("no party in this Court contends that the purpose of the statute or of the New York City Title I program is to advance or endorse religion"); cf. *Lemon*, 403 U.S. at 613; *Committee for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973). Respondents have suggested that, under *School District of the City of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985), the Title I program is invalid for having the primary effect of advancing religion. Br. in Opp. 16-19. That submission should be rejected. The overwhelmingly secular effect of Title I was so clear in *Aguilar* that the Court bypassed the "primary effect" prong of the *Lemon* test entirely and discussed only entanglement. See 473 U.S. at 423-424, 426 (O'Connor, J., dissenting). But see *id.* at 417-418 (Powell, J., concurring).

Title I differs from the "Shared Time" program at issue in *Ball* in several crucial respects that highlight the complete secularity of Title I. The Shared Time program involved public school teachers in the regular course work of the religious school, under the overall direction of the religious school; it thus presented the danger that public school

1. Since *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), the Court has indicated that governmental action with a secular purpose may violate the Establishment Clause if "the end result—the effect—is * * * an excessive government entanglement with religion." *Id.* at 674. One danger of such entanglement, as the Court noted in *Walz*, is that joint religious and secular involvement in the administration of programs may require "official and continuing surveillance" of the religious institutions, to the detriment of the latter's independence from the state. *Id.* at 675; see *id.* at 691 (Brennan, J., concurring) (danger arises from "extensive state investigation into church operations and finances"). Another concern, noted by Justice Harlan, is that government participation in programs administered by religious institutions may lead to political "fragmentation" as the polity divides along religious lines. That danger is most likely when government inserts itself into "details of administration and

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teachers would significantly relieve the religious schools of their responsibility for teaching secular subjects, freeing those schools to focus their resources and energies on religious activities. See 473 U.S. at 377 ("[t]he nonpublic school administrators then decide which courses *they want to offer*") (emphasis added); *id.* at 388 ("Shared Time instructors are teaching academic subjects in religious schools in courses virtually indistinguishable from the other courses offered during the regular religious schoolday."). See also *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993) (noting that program in *Ball* provided "direct grants of government aid [and] relieved sectarian schools of costs they otherwise would have borne in educating their students"). Finally, the Shared Time program lacked Title I's extensive safeguards against use of the program to advance religion. *Ball*, 473 U.S. at 387 ("[N]o attempt is made to monitor the Shared Time courses for religious content."). Title I, by contrast, involves supplementary services provided by public school teachers under the supervision of public school authorities with safeguards to ensure the program's secularity.

planning" of a religious organization's program. *Id.* at 695 (separate opinion).

At the same time, the Court has stressed that religiously affiliated organizations play an important role in the pluralistic aspect of American life, not least in achieving the secular benefits of education. *Walz*, 397 U.S. at 673-674; *Board of Educ.* v. *Allen*, 392 U.S. 236, 247-248 (1968). It is not the case that religious institutions exist to accomplish only sectarian objectives, or that such sectarian objectives are inextricably intertwined with nonreligious ones. See *id.* at 248. Accordingly, government need not refuse to lend all support to the secular objectives of religious institutions; rather it may, as part of a broader program including both religious and nonreligious institutions, lend at least some support to the secular education of students in religious schools, as long as "the activity does not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom.'" *Id.* at 249 (Harlan, J., concurring). See also *Everson* v. *Board of Educ.*, 330 U.S. 1, 17-18 (1947); *Bowen* v. *Kendrick*, 487 U.S. 589, 607 (1988) ("Nothing in our previous cases prevents Congress from * * * recognizing the important part that religion or religious organizations may play in resolving certain secular problems.").

"The test is inescapably one of degree." *Walz*, 397 U.S. at 674. And—crucially for this case—it is not to be *presumed* that public authorities delivering secular services will be unable to distance themselves from sectarian aspects of religious institutions, or that they will not honestly discharge their constitutional obligations. *Allen*, 392 U.S. at 245; see *Lemon*, 403 U.S. at 617; *Hunt* v. *McNair*, 413 U.S. 734, 745-749 (1973); *Committee for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 660-661 (1980). Rather, to create an Establishment Clause viola-

tion, the danger of entanglement from "the cumulative impact of the entire relationship" (*Lemon*, 403 U.S. at 614) must "inhere[] in the situation," and must be shown in the record to exist "to a substantial degree" (*id.* at 617).

In particular, the problem of entanglement arises only if there is a "realistic likelihood" that the administration of a program will require extensive supervision of the operations of a religious institution by state authorities. See *Hunt*, 413 U.S. at 747 (no violation absent "realistic likelihood" of supervision of religious institution by state authorities); *Tilton* v. *Richardson*, 403 U.S. 672, 686-688 (1971) (plurality opinion). And if a program does not involve direct aid to pervasively sectarian institutions, which would require continuing and detailed supervision to ensure that the funds are applied only to secular purposes, "the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened." *Id.* at 687; see *Regan*, 444 U.S. at 659-660.

2. Before *Aguilar*, the Court stressed that no constitutional violation exists absent an actual, rather than hypothetical, danger of entanglement between religious and secular authorities. In *Hunt* v. *McNair*, for example, the Court rejected the contention that the use of revenue bonds for the financing of a religiously affiliated college presented a danger of entanglement because of the possibility that the state educational authority might become "involved in the day-to-day financial and policy decisions of the [c]ollege." 413 U.S. at 747. In light of a state court decision circumscribing the state agency's authority to ensuring only that fees charged by the college were sufficient to meet bond payments, the Court refused to invalidate the program on the hypothetical possibility that a college might default on the bonds, leading the agency to foreclose and operate the college. *Id.* at 748-749; see *id.* at

749 ("The specific provisions of the Act * * * confine the scope of the assistance to the secular aspects of this liberal arts college and do not foreshadow excessive entanglement.").[8]

Likewise, in *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976), the Court concluded that a program of grants to private colleges, made subject to the restriction that the funds not be used for sectarian purposes, had not been shown to present any actual danger of entanglement between church and state.[9] Although there was a "process of annual interchange—proposal and approval, expenditure and review"—between the colleges and the state funding authority (*id.* at 762) (opinion of Blackmun, J.), the fact of overriding significance was "the ability of the State to identify and subsidize separate secular functions carried out at the school," without on-the-site inspections *of the activities of the religious college* being necessary to prevent diversion of the funds to sectarian purposes. *Id.* at 765 (opinion of Blackmun, J.). Since both the recipient colleges and the state authorities were "capable of separating secular and religious functions" without undue interaction (*id.* at 766) (opinion of Blackmun, J.), the program was upheld.

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[8] Contrast *Nyquist*, 413 U.S. at 794 (finding that direct financial assistance to religious schools carried "grave potential" of continuing political strife); *Levitt* v. *Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) (finding a "substantial risk" that direct financial assistance to religious schools for student examinations would advance religion, because "the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities").

[9] Although only three Justices joined the lead opinion in *Roemer*, Justice White and then-Justice Rehnquist concurred in the judgment on broader grounds, agreeing that no danger of entanglement was present and suggesting that there is no separate "entanglement" doctrine under the Establishment Clause. 426 U.S. at 767-770.

In *Wolman* v. *Walter*, 433 U.S. 229 (1977), the Court upheld a practice under which state personnel supplied private schools with the same standardized tests used by students in public schools, and scored those tests as well. Since the private schools did not control the content or the result of the tests, there was no need for state supervision of religious schools to ensure the secular content of the tests, and therefore no actual danger of entanglement. *Id.* at 240-241 (plurality opinion). Similarly, in *Regan*, the Court upheld the use of state funds to reimburse private schools for the administration and scoring of standardized tests that the state supplied and required the schools to administer, emphasizing that the reimbursement process, including auditing, was "straightforward and susceptible to * * * routinization." 444 U.S. at 660.

The only decision before *Aguilar* suggesting a different approach towards entanglement concerns was *Meek* v. *Pittenger*, 421 U.S. 349 (1975). *Meek* invalidated a practice by which state educational authorities would "supply professional staff * * * to the nonpublic schools * * * when 'requested by nonpublic school representatives,'" to deliver secular "auxiliary services" to private school students. *Id.* at 367. The Court suggested that the State was required to be "certain" that its teachers would not advance the religious mission of the schools where they were sent, and it found at least a possibility of "inadvertent fostering of religion" even in the delivery of secular educational services by public employees when surrounded by the environment of a sectarian school, *id.* at 370-371. The Court also declined to rely on the "good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." *Id.* at 369. It suggested that such a presumption of good faith was precluded by a companion case to *Lemon*, which had invali-

dated the use of public funds to supplement the salaries of religious school teachers who (unlike the auxiliary teachers in *Meek*) were subject to the control and discipline of the religious school's authorities. *Id.* at 369-370; cf. *Lemon*, 403 U.S. at 617-619. *Meek* is, therefore, somewhat inconsistent with the Court's other entanglement decisions. See pp. 30-33, *infra* (discussing *Meek*).

B. *Aguilar* Was A Departure From Most Of The Court's Previous Entanglement Cases, And Incorrectly Decided That Delivery Of Title I Services In Religious Schools Presents A Danger Of Entanglement

In *Aguilar*, the Court held unconstitutional the use of Title I funds to send public school teachers into religious schools to provide remedial instruction with respect to purely secular subjects. The Court's ruling was premised on two considerations. First, although the Court noted that New York City's Title I program had safeguards to prevent public funds from being used, "intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school," it concluded that those safeguards themselves created a constitutional difficulty, in that the supervision necessary to ensure that those impermissible effects would not occur "inevitably results in the excessive entanglement of church and state." 473 U.S. at 409. The Court believed that "pervasive monitoring by public authorities in the sectarian schools" was necessary to "ensure the absence of a religious message" in the Title I services. *Id.* at 412-413.

Second, the Court concluded that the "administrative cooperation that is required" between public and religious school personnel in the everyday implementation of the program "entangles church and state in still another way that infringes interests at the heart of the Establishment

Clause." 473 U.S. at 413. As part of that cooperation, "[a]dministrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding that program." *Ibid.* Furthermore, "the program necessitates 'frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved.'" *Ibid.*[10]

We address those considerations in reverse order. First, the administrative contacts involved in implementation of Title I are no greater than the routine contacts that the Court had, in the past, recognized as permissible, and are necessary even if the Title I instruction takes place away from religious schools—in which case no Establishment Clause problem is present. Second, even under the Court's Establishment Clause jurisprudence before *Aguilar*, the Court should not have found excessive entanglement on the basis of the hypothetical (indeed nonexistent) possibility that intrusive supervision of the religious school would be necessary to ensure that public school teachers did not deliver a religious message. In addition, *Aguilar* is not consistent with subsequent Establishment Clause decisions, which have returned to the pre-*Aguilar* requirement of an actual danger of *entanglement*—not contact—between church and state.

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[10] Justice Powell also suggested that the "aid to religion" he perceived in Title I carried a "risk of political divisiveness," in that "any proposal to extend direct governmental aid to parochial schools alone is likely to spark political disagreement from taxpayers who support the public schools, as well as from nonrecipient sectarian groups, who may fear that needed funds are being diverted from them." 473 U.S. at 416-417 (concurring opinion).

1. This Court has made clear that "[s]eparation [between church and state] cannot mean absence of all contact." *Walz*, 397 U.S. at 676. Some contact is acceptable, indeed inevitable. See *Lemon*, 403 U.S. at 625. When the administrative contacts needed to carry out a secular program are "straightforward and susceptible to * * * routinization," there is no excessive entanglement on the face of the program, and no reason to presume that such entanglement will inevitably occur in its application. *Regan*, 444 U.S. at 660-661 (finding no entanglement in contacts necessary to administer a program of state reimbursement to religious schools for administering and grading state-prescribed examinations). Thus, in *Walz*, 397 U.S. at 674-676, the Court found no excessive entanglement in the routine (and inevitable) contacts between church and state over the administration of the local tax code exemptions. See *Lemon*, 403 U.S. at 614 (emphasizing that there was no entanglement in *Walz* even though the State "had a continuing burden to ascertain that the exempt property was in fact being used for religious worship"). Nor was entanglement found in *Mueller* v. *Allen*, 463 U.S. 388 (1983), which upheld state tax deductions for textbooks, even though state officials were required to disallow deductions for instructional books and materials to be used for the teaching of religious doctrine. Making such straightforward decisions between religious and nonreligious materials, held the Court, did not amount to the "comprehensive, discriminating, and continuing state surveillance" that constitutes impermissible entanglement. *Id.* at 403.

The "contacts" between state officials and nonpublic school administrators in the delivery of Title I services are also straightforward and routine. Those contacts (both before and after *Aguilar*) generally fall into three categories: (1) disseminating information about Title I to

private school administrators, (2) consulting with private school officials about the Title I services to be provided, and (3) resolving "individual student needs, problems encountered, and results achieved." *Aguilar*, 473 U.S. at 413; see J.A. 59, 647. Those contacts give religious school officials no control over the content of the program (see J.A. 647; 34 C.F.R. 200.11(b)(3); *Wheeler* v. *Barrera*, 417 U.S. 402, 424 (1974)), nor do they involve Title I personnel in the affairs of the religious schools. The Title I supervisors have only casual and periodic contact with nonpublic school administrators and little, if any, contact with nonpublic school teachers. Title I supervisors review and evaluate only the performance of the Title I teacher in the Title I classroom, and neither the religious school program nor its instructional material is subject to public supervision. See generally J.A. 59-63; see also J.A. 50-51, 52-55, 647. Before *Aguilar*, the public instructors who went into religious schools were supervised by field personnel, who attempted to make no more than one unannounced visit per month. The field supervisors, in turn, reported to public program coordinators, who also paid very occasional unannounced supervisory visits to monitor Title I classes in the religious schools. See *Aguilar*, 473 U.S. at 407; J.A. 645 (similar number of supervisory visits after *Aguilar*). Those contacts are no more intrusive than, and are equally as routine as, the contacts upheld as permissible by the Court before *Aguilar* in *Walz*, *Regan*, and *Mueller*.[11]

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[11] This Court noted in *Aguilar* that the public school professionals involved in the Title I program were directed to avoid involvement with religious activities conducted within the private schools and to bar religious materials in their classrooms. All materials and equipment used in the programs funded under Title I were supplied by public school personnel and were used solely in those programs. The public school personnel were also solely responsible for the selection of

Moreover, the contacts involved are inevitably required however Title I services are provided to nonpublic school students—whether in religious schools, public schools, mobile units, or through computer-assisted instruction. At some point, public and private school teachers must discuss the precise needs of individual students and the nature of the public services to be delivered to the students. Under the logic of *Aguilar*'s emphasis on contacts, however, the decision would bar any implementation of Title I for religious school children. Yet clearly, the Court had no such result in mind, for it had already upheld the provision of state-funded counseling, therapeutic, and remedial services to religious school students away from their schools. *Wolman*, 433 U.S. at 247-248; see also *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1460-1461 (9th Cir. 1995); *Aguilar*, 473 U.S. at 418-419 (Powell, J., concurring); *id.* at 430-431 (O'Connor, J., dissenting). The routine administrative contacts necessary to make Title I services available to religious school students cannot be a sufficient basis for invalidation of the program, even insofar as the services are delivered inside religious schools.

2. a. The federal government and New York City have recognized that Title I services, wherever they are delivered, must be entirely secular in content and must be separate from (and supplementary to) the ordinary instruction of a religious school. The services are therefore designed and delivered by public personnel, who have only administrative and routinized contacts with the nonpublic

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the students. Additionally, they were informed that contact with private school personnel should be kept to a minimum. Finally, the administrators of the religious schools were directed to clear the classrooms used by the public school personnel of all religious symbols. *Aguilar*, 473 U.S. at 407. Those principles also apply to the current program. See J.A. 644-648.

school authorities. But for *Aguilar*, the services would be delivered to certain students inside a religious school because that is where those students are for most of the day. The only question is whether the mere fact that Title I services might be provided inside religious school buildings, by itself, presents a serious danger of entanglement.

The Court in *Aguilar* believed that it would take a "comprehensive system of supervision" to "ensure that teachers in parochial schools were not conveying religious messages to their students," and that such "a comprehensive system * * * would inevitably lead to an unconstitutional administrative entanglement between church and state." See 473 U.S. at 410. The Court relied in part on *Lemon* for that conclusion. *Id.* at 410, 412. *Lemon*, however, involved salary supplements to *religious* school teachers; the Court in *Lemon* observed that those teachers, who had been hired by, and were under the discipline of, a religious authority, were inherently likely to infuse their instruction with religious content (wittingly or not). 403 U.S. at 618-619. Comprehensive monitoring was required to prevent religious school teachers from giving religious content to their own school's instructional program. That monitoring, however, was necessary not because the instruction occurred inside a religious school building, but because the instruction was offered by religious schools and delivered by teachers of those schools.

By contrast, Title I services are delivered directly to students by *public school* teachers under the supervision of *public school* authorities. Those authorities' supervision of their own personnel entails no relationship between the government and religious authorities and, as a result, no intrusion of the government into church matters (including the religious school's instructional content). See *Aguilar*, 473 U.S. at 421 (O'Connor, J., dis-

senting) ("The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion."). The supervision required is no different, in principle, from the supervision necessary to ensure that teachers in the public schools comply with this Court's school prayer decisions or, indeed, to prevent impermissible religious effects even when Title I classes for religious school students are taught in public school classrooms. The Constitution simply does not prohibit such "entanglement" between the government and its own public employees. See *Wolman*, 433 U.S. at 246-248.

In addition, the "unannounced supervisory visits" by public school authorities described by the Court in *Aguilar* (see 473 U.S. at 407) were no more intrusive than the monitoring occasioned by many public regulatory programs, such as state accreditation of schools and compliance with fire code requirements; and in any event, the purpose of those visits was to monitor the public instructors, not the religious school teachers. The religious school merely supplied a classroom in specified condition and allowed access to that classroom by public school teachers and supervisors; there was accordingly no reason for a Title I supervisor to examine anything other than that classroom. Not surprisingly, therefore, there was no indication in the record of any friction caused by the occasional visits by Title I supervisors to Title I classrooms.[12]

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[12] The Court also expressed concern about Title I supervisors "prowling the halls" of religious schools. 473 U.S. at 414. That concern, we submit, was entirely theoretical. The *Aguilar* record reflects no such "prowling," even though the Title I program had operated in New York City for almost two decades; there was no showing that Title I required a "permanent and pervasive state presence in the sectarian schools," *id.* at 412-413. The Court also suggested that, because classrooms were required to be cleared of religious symbols, there might be

At bottom, then, the decision in *Aguilar* must be based on the possibility that public school teachers might internalize their surroundings when they are inside religious schools, and that supervision of those teachers would therefore be necessary "to guard against the infiltration of religious thought." 473 U.S. at 413. We submit that—contrary to the situation in *Lemon*—there was simply no basis in the *Aguilar* record (or elsewhere) for any concern that professionally trained public school teachers, under secular control, delivering secular services in a school whose religion they might not even share (see J.A. 341, 642-643) would succumb to unconscious pressure to deliver a religious message in their instruction. To invalidate a remedial program on such speculative concerns is contrary to the practical approach of virtually all of the Court's Establishment Clause decisions.

b. The Court in *Aguilar* suggested (473 U.S. at 410, 412-413) that the case was controlled by *Meek* v. *Pittenger*, 421 U.S. 349 (1975). The auxiliary services program invalidated in *Meek* is similar in several respects to Title I, and *Meek* did (like *Aguilar*) find a danger of entanglement even in "the absence of any record support for the notion that public school teachers would attempt to inculcate religion simply because they temporarily occupied a parochial school classroom, or that such instruction would produce political divisiveness." See *Aguilar*, 473 U.S. at 427 (O'Connor, J., dissenting). Thus, the analytical

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friction between public and religious school authorities "as to what is and what is not a 'religious symbol.'" *Ibid.* In fact, the question of "what is a religious symbol" would not require *ongoing* interaction between public and religious school administrators. Once agreement is reached about the removal of certain symbols from a classroom, the question need not be revisited. Cf. *Mueller*, 463 U.S. at 403 (no danger of entanglement in state tax authorities' duty to disallow deductions for religious materials).

approach in *Meek* to claims of entanglement, like that in *Aguilar*, is inconsistent with the Court's other decisions in this area.[13]

Nonetheless, the Court need not read *Meek* as resting on a *per se* rule that all secular instruction delivered directly to students by public personnel inside religious schools is unconstitutional. Just one year before *Meek*, in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), the Court was faced with the question of the constitutionality, in the abstract, of such a Title I program. In that case, an LEA had declined to offer instructional services in religious school classrooms, arguing that to do so would violate the Establishment Clause. The Court declined to resolve that issue, and stated that the question should be decided on the basis of "a careful evaluation of the facts of the particular case." *Id.* at 426. The Court observed that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." *Ibid.*

Five Terms after *Meek*, in *Committee for Public Education & Religious Liberty* v. *Regan*, the Court explicitly rejected a broad interpretation of *Meek*:

> *Meek* * * * is said to have held that any aid to even secular educational functions of a sectarian school is forbidden, or more broadly still, that any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of

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[13] *Meek* relied on *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), aff'd summarily, 417 U.S. 961 (1974). *Marburger*, however, involved a program in which public funds were provided to nonpublic schools to enable them to hire public school personnel for remedial services that the nonpublic schools deemed appropriate. Thus, when the *Marburger* program operated in the religious schools, it was under the control of the religious schools rather than the public schools.

> its activities. * * * [T]hat case was simply not understood by this Court to stand for [such a] broad proposition.

444 U.S. at 661. Similarly, *Meek* does not require a broad reading that instructional services delivered by public school teachers inside religious schools are inherently suspect.

Further, even if *Meek* was correctly decided on its facts (a question the Court need not reach here), there are several important differences between *Meek* and this case. First, the Title I program is governed by specific regulations and guidelines governing services to private school children that are made known to Title I personnel and the nonpublic schools as well. See J.A. 50-55, 643. This has the beneficial effect of routinizing the conduct of the program and eliminating the need for *ad hoc* judgments about the relations between the religious school and the Title I program. See *Regan*, 444 U.S. at 660 (upholding program where it is "straightforward and susceptible to * * * routinization"). In *Meek*, by contrast, the principles for administering the auxiliary services program had not been so routinized, and so there was a potential for "controversy between the Commonwealth and religious authorities over the extent of the teachers' responsibilities and the meaning of the legislative and administrative restrictions on the content of their instruction." *Meek*, 421 U.S. at 372 n.22.

Second, the Title I program is encompassed in a single statute that provides aid to students in both public and nonpublic schools according to a fixed statutory formula. See 20 U.S.C. 6321(a), 6313(c). This obviates any possibility that the program might foster chronic controversy over the amount of aid to be given to nonpublic school students. Indeed, there is no indication in the record that

Title I has precipitated acrimonious debate in the political arena. By contrast, the program in *Meek* required aid for public and nonpublic school students through separate statutory schemes requiring separate annual appropriations decisions. See 421 U.S. at 352, 372. That perennial review process created risks of "repeated confrontation between proponents and opponents of the * * * program [and] * * * political fragmentation and division along religious lines" (*id.* at 372).

In sum, aside from the possibility that public school teachers might become influenced by the surrounding "atmosphere dedicated to the advancement of religious belief" (421 U.S. at 371)—a concern that, as we have suggested, is entirely hypothetical and surely should not be presumed—many of the important factors in *Meek* are not present in this case. Accordingly, *Meek* did not dictate the result in *Aguilar*, and does not prevent *Aguilar* from being overruled. Should the Court disagree, however, and conclude that the auxiliary services program invalidated in *Meek* is not distinguishable from this case, we believe that aspect of *Meek* should also be overruled.

C. Since *Aguilar*, The Court Has Returned To Its Previous Approach To Entanglement Problems

The Court's decisions subsequent to *Aguilar* have returned to the more restrained and practical approach to entanglement concerns. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Court rejected a facial constitutional challenge to the Adolescent Family Life Act (AFLA), 42 U.S.C. 300z *et seq.*, which provides for grants to public and nonprofit organizations, including organizations with religious affiliations, for services relating to adolescent sexuality and pregnancy. In rejecting the contention that the AFLA has a primary effect of advancing religion, the Court noted that the use of granted funds to promote

religious doctrine was contrary to the intent of the legislation, and that grantees are required to undergo evaluations of their services by the government "to ensure that federal funds are not used for impermissible purposes." 487 U.S. at 615.

Concerning entanglement, the Court observed that federal "monitoring of AFLA grants is necessary if the [government] is to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause." *Kendrick*, 487 U.S. at 615. Nonetheless, the Court concluded that, at least on the facial challenge presented there, where it could not be assumed that grants would necessarily be made to pervasively sectarian institutions, there was no basis for concluding that "this type of grant monitoring [would] amount to 'excessive entanglement.'" *Id.* at 617. Thus, in *Kendrick*—which concerned a program that, like the Title I program, does *not* require direct financial assistance to pervasively sectarian institutions—the Court found no basis for a presumption that the government would have to enmesh itself in disputes over religious doctrine or in church administration. The Court left open for remand whether, in particular cases, it might be shown that federal funds had been granted improperly to pervasively sectarian groups or had been used by recipients for religious activities. *Id.* at 620-622.[14]

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[14] In *Kendrick*, the Court suggested that *Aguilar* was a case about "aid to parochial schools," and that "the elementary and secondary schools receiving aid were 'pervasively sectarian.'" 487 U.S. at 616. With respect, we submit that *Aguilar*—and Title I generally—do not involve aid *to* parochial schools at all (unlike, for example, the Shared Time program invalidated in *Ball*). Whether or not the religious schools in New York City are pervasively sectarian, those schools would not "receiv[e] aid" under Title I even if the instructional services were delivered inside their schools. Accordingly, as was true in *Kend-*

In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), the Court upheld the use of public funds to pay for a sign-language interpreter to accompany a deaf child in classes at a Catholic high school. Although the school district in that case argued that *Meek* prohibited the use of public funds for such a purpose, the Court rejected such a broad reading of *Meek*, and stated that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Id.* at 12-13. Although the Court did not expressly discuss the entanglement doctrine, it distinguished *Meek* as a case in which the religious schools were "reliev[ed] * * * of an otherwise necessary cost of performing their educational function," *id.* at 12, a description that cannot apply to this case, since Title I services must be supplementary.

Finally, in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994), five Justices expressly criticized *Aguilar* as inconsistent with the Court's Establishment Clause jurisprudence. Justice O'Connor stated that the Court "should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, towards religion." *Id.* at 717-718 (opinion concurring in part and concurring in the judgment). Justice Kennedy suggested that *Aguilar* "may have been erroneous," and that "it may be necessary for [the Court] to reconsider [that decision] at a later date," in order to remove the constitutional cloud from a "neutral aid scheme, available to religious and nonreligious alike," such that minority religions "would have no need to seek special accommodations." *Id.* at 731 (opinion concurring in the judgment).

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rick, the Court here need not consider any entanglement concerns raised by aid to pervasively sectarian institutions.

Justice Scalia, joined by the Chief Justice and Justice Thomas, "heartily agree[d]" that *Aguilar*, "so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity." *Id.* at 750 (dissenting opinion).

Kendrick and *Zobrest*, as well as the separate opinions in *Kiryas Joel*, recognize that the question of entanglement is, inevitably, related to the question of impermissible religious effects. If there is no serious concern that the benefits of a secular program will advance religion—for example, because the program remains firmly under state control and must be put to exclusively secular purposes—then the danger of entanglement is likely to be minimal as well. On the other hand, there may be situations in which—because of the direct participation of religiously affiliated institutions in a program—it can be shown that the prevention of an impermissible effect (the use of public funds to inculcate religious doctrine) requires intrusive state supervision of a religious institution. See, *e.g.*, *Lemon*, *supra*. That, however, is fundamentally an empirical question, which cannot be answered *a priori*. Nor should any danger of entanglement be assumed where the inculcation of religious doctrine is highly implausible—as here, where the services are delivered by public school personnel, not teachers dedicated to the spiritual mission of a religious school.

D. *Aguilar* Has Had Serious Adverse Economic and Educational Effects

In contrast to the insubstantial danger that public and religious school authorities will become enmeshed in divisive conflict should public school teachers resume delivery of Title I services in nonpublic schools is the very real cost to the education of both public and nonpublic school children that was made necessary by the decision in *Aguilar*. The alternatives to instruction at a child's own school —computer-assisted instruction, instruction in a rented unit, transportation to a public school—are often less effective. The attendant financial costs, moreover, are considerable, and in a world of finite resources, money spent for renting a neutral site means less money for instruction. Those costs, of course, would have to be borne if the Constitution required them, but for the reasons we have given, we believe that they are not required. And since they are not, the very real loss to the educational opportunities for needy and failing students presents a compelling reason for overruling *Aguilar*.

The considerable costs of *Aguilar*, in both educational and economic terms, have been documented. An assessment of Title I services delivered to private school students commissioned by the Department of Education in 1993 concluded that *Aguilar* "makes it difficult to achieve qualitative equitability" for nonpublic school students and "will continue to make equitability a problematic objective." United States Dep't of Education, *Chapter 1 Services to Private Religious School Students* viii (Aug. 1993) (lodged with the Clerk). That study observed that "vans and portable classrooms can be cramped and noisy, permitting little movement or activity and typically providing limited space for storing materials and supplies," and that "[i]nadequate heating, noise from electrical

generators or traffic, immovable tables and benches, and physical isolation test the inventiveness of even the most seasoned and creative teachers." *Id.* at 21. (One case study of "van teaching" noted that the class ended with the teacher leading the children "out into the cloudy 10-degree day and across 100 yards of an ice-covered parking lot to return to their school." *Id.* at 23.) The study also noted that transportation of religious school students to other sites raises concerns about the students' safety and conflict with their schools' instruction schedules, and that computer-assisted instruction has considerable disadvantages, including the physical isolation of the students and inadequate communication about student work and progress. *Id.* at 33-34. See also H. R. Rep. No. 95, 100th Cong., 1st Sess. 30-31 (1987) (noting substantial decrease in quality of Title I services provided to private school children since *Aguilar* was decided); S. Rep. No. 222, 100th Cong., 1st Sess. 14 (1987) (similar); J.A. 316-333, 614-640 (City's affidavits detailing flaws with all instructional methods tried for nonpublic school students since *Aguilar*).

Studies have also noted the considerable fiscal impact of *Aguilar* on school districts' ability to provide services to both public and private school students. A 1989 General Accounting Office study of the effects of *Aguilar* concluded that $105 million had been or would be spent on capital expenses since that decision to comply with *Aguilar* (not including expenditures in California). General Accounting Office, *Compensatory Education*: Aguilar v. Felton *Decision's Continuing Impact on Chapter 1 Program* 2-3 (1989) (lodged with the Clerk); see *id.* at 18-22. Those expenditures greatly exceeded a 1989 appropriation of $19.8 million made by Congress to assist school districts in paying for compliance with *Aguilar*. *Id.* at 2,

22-23.[15] New York City's affidavits also demonstrated that compliance with *Aguilar* is very costly. J.A. 333, 336-337 ($93 million in 1986-1994), 651-657.

Experience has therefore shown that *Aguilar* has led to considerable cost to education and the public fisc but has yielded little constitutional benefit, in the sense of preventing any real entanglement between governmental and religious institutions. The constitutional value of ensuring that government does not advance or become enmeshed in religion simply does not require that public school teachers be forbidden from entering a religious school to deliver a purely secular program firmly under state control. Accordingly, and in light of the importance of equal educational opportunity, we submit that *Aguilar* should be overruled.

II. RULE 60(b) IS A PROPER VEHICLE FOR OBTAINING THE RELIEF PETITIONERS SEEK

The petitioners' requests that *Aguilar* be overruled come to this Court in an unconventional posture, on certiorari from the lower courts' refusal to vacate an injunction that was entered on remand from this Court's prior decision in the same case. As we explained above, decisions subsequent to *Aguilar* (*Kendrick* and *Zobrest*), followed by the separate opinions in *Kiryas Joel*, indicate that *Aguilar* is inconsistent with the Court's entanglement decisions both before and since. That circumstance warrants reexamination of *Aguilar* by this Court. The lower courts were, of course, bound to follow this Court's directly controlling precedent, as they recognized. But

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[15] Because of the high costs of complying with *Aguilar*, Congress has continued to authorize and appropriate considerable sums to assist LEAs in that compliance. See 20 U.S.C. 6321(e), 6302(e). We are informed that Congress has appropriated about $300 million since Fiscal Year 1989 for that purpose.

this Court may nonetheless reconsider and overrule *Aguilar* on review of the lower courts' denial of relief under Rule 60(b).

A. This Court May Reconsider *Aguilar* On Review Of The Lower Courts' Denial Of Relief Under Rule 60(b)

1. Rule 60(b) "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1460 (1995) (quoting *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)). "Since Lord Bacon's day a decree in equity may be reversed or revised for error of law, * * * [a]nd this head of equity jurisdiction has been exercised by the federal courts from the foundation of the nation." *Hazel-Atlas*, 322 U.S. at 259 (Roberts, J., dissenting).

There can be no dispute, therefore, that federal courts have the authority under Rule 60(b) to vacate injunctive relief that is no longer required in light of intervening decisional law. That much was settled by *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 433-435 (1976), where the Court held that a district court should have modified a school desegregation decree forbidding any "majority minority" schools, once this Court held, in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), that the Equal Protection Clause does not impose such an inflexible requirement in school desegregation cases. Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 390 (1992) (district court has authority, under appropriate circumstances, to modify terms of consent decree no longer required by decisional law). "[A] sound judicial discretion may call for the modification of

the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen," and "the court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.'" *System Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO* v. *Wright*, 364 U.S. 642, 647 (1961) (quoting *United States* v. *Swift & Co.*, 286 U.S. 106, 114-115 (1932)); see also *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435-436 (1856) (holding that injunction should not be enforced because of intervening changes in statutory law).

Rule 60(b) therefore permits a district court to vacate an injunction in light of changes in this Court's decisions, as long as there is no directly controlling precedent of this Court that continues to mandate that injunction. Assume, for example, that in this case, respondents had brought their constitutional challenge to Title I in 1978, that the district court had ruled in their favor based on *Meek* (a similar but not identical case) and entered injunctive relief, and that the injunction had not been appealed. Had this Court never decided the precise issue raised in *Aguilar*, the district court could have looked to *Kendrick* and *Zobrest*, concluded that the approach taken to entanglement problems in *Meek* no longer prevailed in this Court, and vacated an injunction forbidding the expenditure of Title I funds for the salaries of public school teachers who deliver supplemental services in religious schools.

The difficulty here arises from the fact that the Court has decided the precise issue in this very case. Even if this Court would not decide that issue in the same way today, the lower courts would be bound to follow this Court's directly controlling decision. *Rodriguez de*

Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); see also *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425, 427-428 (1978) (per curiam). The lower courts' obligation in this case to follow *Aguilar*, however, followed from *stare decisis* and law of the case, and not from principles of finality of judgments or a lack of authority under Rule 60(b).[16] As the Court made clear in *Standard Oil Co. of California* v. *United States*, 429 U.S. 17 (1976) (per curiam), a district court may entertain a motion for relief from its judgment under Rule 60(b) even if that judgment has been affirmed by this Court; "[l]ike the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district court is not flouting the mandate by acting on the motion." *Id.* at 18.

This Court, however, has the authority to reconsider its own precedents, notwithstanding the doctrines of *stare decisis* and law of the case. Neither doctrine is an "inexorable command," and the Court has overruled its decisions when they were shown to be incorrectly reasoned and inconsistent with other decisional authority. See *Payne*, 501 U.S. at 827-829; *Fulton Corp.*, 116 S. Ct. at 860-861; *United States* v. *International Business Machines Corp.*, 116 S. Ct. 1793, 1811-1812 (1996) (Ginsburg, J., dissenting). Appellate courts (including this Court) have the authority to reconsider their precedents even in the same case, for

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[16] Indeed, once this Court decided *Aguilar*, all district courts in the country were bound by that decision, whether or not they were faced with pending litigation challenging the constitutionality of Title I. That is true even though later cases of this Court might have eroded *Aguilar*. See *Rodriguez*, 490 U.S. at 484 ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls.").

law of the case, like *stare decisis*, is a rule of policy rather than authority, and courts may depart from the law of the case when "controlling authority has since made a contrary decision of the law applicable to [the] issues." *White v. Murtha*, 377 F.2d 428, 431-432 (5th Cir. 1967). See *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912) (law of the case "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power"); *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (same). Cf. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 446 (1992) ("Of course, we surely have the power to accede to Oklahoma's request at this late date * * * to depart from our prior rulings."); *Arizona* v. *California*, 460 U.S. 605, 618 (1983).

It is not dispositive that the standard of appellate review of denials of relief under Rule 60(b) is frequently referred to as "abuse of discretion." See *Wright*, 364 U.S. at 648. As the Court has explained, a district court "abuses its discretion" whenever it makes a decision based on erroneous legal principles. See *Koon* v. *United States*, 116 S. Ct. 2035, 2047 (1996); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Thus, if this Court determines that *Aguilar* is no longer good law, it may announce the correct rule of law and direct the lower courts to grant the requested relief, even though the lower courts could not have done so on their own, in anticipation of that decision.

There is, to be sure, a legitimate concern that parties bound by injunctions might invoke Rule 60(b) for the purpose of obtaining appellate reconsideration of a precedent, even when there is little likelihood that the appellate court will in fact reverse itself. In our view, however, those concerns are adequately met by the doctrines of *stare decisis* and law of the case, which ensure that courts do not lightly reconsider their legal rulings. Meritless contentions that precedents should be overruled

will be answered by decisions refusing to take that step. There is no need for an additional door-closing device to prevent courts from correcting earlier errors of law. That point is well shown by cases like this one, in which petitioners seek relief from a judgment based on a decision of this Court that has been called into question, but not expressly overruled, by subsequent decisions of this Court, and that imposes significant educational and economic costs. In such a circumstance, this Court should not be disabled from reexamining its decision.

2. It is doubtful whether, absent the avenue for relief under Rule 60(b) that petitioners have invoked, this Court would ever be presented with a suitable vehicle for reconsideration of *Aguilar*. As we have noted (p. 6 n.6, *supra*), private plaintiffs have challenged the provision of Title I services to religious school students even after *Aguilar* as inconsistent with the Establishment Clause, but those contentions have been uniformly rejected in the lower courts. The losing plaintiffs have not sought this Court's review, and, because the school districts and the Secretary prevailed in those cases, there has been no opportunity to request this Court to reconsider *Aguilar*.[17]

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[17] In *Helms* v. *Cody*, 856 F. Supp. 1102 (E.D. La. 1994), a district court invalidated Louisiana's special education statute, insofar as it allowed state-paid teachers to teach inside pervasively sectarian schools. *Id.* at 1121-1122. The court subsequently upheld the application in one parish of a federal program under which both public and nonpublic schools receive instructional equipment. *Helms* v. *Cody*, 1997 WL 35283 (E.D. La. Jan. 28, 1997). Even if there might be cases pending that are somewhat similar to *Aguilar*, such cases do not necessarily present suitable vehicles for full reconsideration of *Aguilar* by this Court. As we have explained, each of this Court's entanglement decisions is crucially dependent on the facts of the case, and there might be significant factual differences between a current state program and Title I, just as there were significant differences between the programs at issue in *Meek* and *Aguilar*. Indeed, the district court that invali-

Further, because the Secretary of Education recognizes the binding authority of *Aguilar*, he is obligated to deny funds to LEAs for the purpose of sending public school teachers to deliver Title I services in religious schools. Parties other than the ones here, such as a school district other than New York, might conceivably bring an action against the Secretary to challenge such a funding decision, but the Secretary's decision would undoubtedly be upheld as consistent with, if not compelled by, *Aguilar*, and in any event all lower courts in the Nation would be obligated to follow *Aguilar*. And because the Secretary supports reconsideration of *Aguilar*, there would be a problem in such a case of identifying a nongovernmental defendant ready, willing, and able to undertake the cost of presenting a full defense against reconsideration of *Aguilar*, and of preparing a record to that end. The district court in this case, however, compiled a full record when the case was previously litigated, and the City updated the record with an extensive affidavit in support of its Rule 60(b) motion. See 96-553 Pet. App. A27-A101.

The only other possible method by which the continuing vitality of *Aguilar* could be tested directly would be for the City of New York to place itself in contempt by deliberately violating the terms of the district court's injunction, and then to seek review of the contempt sanction in the appellate courts, including this Court. In practical effect, however, that could not occur, because the Secretary of Education would not provide the City with funds for a Title I program that included sending teachers into religious schools in violation of *Aguilar*. Moreover,

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dated the Louisiana special education program relied principally on *Ball* rather than *Aguilar*, and it found that the State's financial assistance "is given directly to the schools themselves, and not indirectly through the parents or students." 856 F. Supp. at 1120-1121.

this Court has held that one seeking relief from an injunction *must* ordinarily move for such relief rather than disobey the injunction and place himself in contempt. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Therefore, as the district court found, a motion for relief from an injunction is "far preferable" to a requirement that the City place itself in contempt. Pet. App. 9a.[18]

B. There Is No Deficiency In The Record Preventing This Court's Reconsideration of *Aguilar*

The record in this case is adequate to permit this Court to reconsider *Aguilar*. That record includes the entire record compiled in the earlier proceedings in this case. Petitioners also submitted, with their Rule 60(b) motions, affidavits detailing the additional financial costs necessary to implement post-*Aguilar* delivery methods for Title I services and explaining the educational deficiencies in those methods. J.A. 306-346, 601-657; see also Pet. App. 17a-19a (statement by Secretary of Education about

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[18] If the Court has doubts about the appropriateness of Rule 60(b) as a mechanism for reconsideration of *Aguilar*, we suggest that the Court treat the petitions for a writ of certiorari as petitions for rehearing of the Court's prior ruling in this case (see, *e.g.*, *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam) (granting petition for rehearing three years after prior denial of rehearing)) or as motions to recall and modify the Court's prior judgment (see, *e.g.*, *Cahill* v. *New York, New Haven & Hartford R.R.*, 351 U.S. 183 (1956) (granting motion to recall and amend the Court's judgment)). Cf. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 400 U.S. 939 (1970) (treating application for a stay and opposition thereto as a petition for a writ of certiorari and opposition thereto, and granting certiorari). The Court has, in the past, reconsidered and reversed prior decisions on petitions for rehearing. See *Reid* v. *Covert*, 354 U.S. 1 (1957); *Jones* v. *Opelika*, 319 U.S. 103 (1943) (per curiam). In one way or another, we believe that this Court necessarily has the power to modify a prior judgment, such as *Aguilar*, that has continuing, prospective effect.

adverse educational effects of post-*Aguilar* instruction methods).

In the courts below, respondents suggested that the record was deficient in two ways. First, they argued that there is need for an evidentiary hearing on the financial condition of the Catholic schools whose children participate in Title I, presumably to focus on whether Title I funding is necessary to the schools' survival. Resp. C.A. Br. 25-26. That issue, however, has nothing to do with whether instruction inside religious schools is constitutional. Title I services are not intended to aid private schools, and they are supplementary to the basic curriculum of those schools. Hence, no record development is necessary on that issue.

Second, respondents argued below that there are open issues regarding the religious mission of the Catholic schools where Title I services would be delivered. Resp. C.A. Br. 27. There is in fact no genuine dispute on that issue, which was extensively addressed in the affidavits submitted in the first round of *Aguilar* litigation (see J.A. 256-267) and, again, in affidavits filed in support of the Rule 60(b) motions (see J.A. 659-669, 684-685). In any event, we may assume for present purposes that the Catholic schools have a religious mission and, indeed, are pervasively sectarian, for that does not affect the outcome of this case.[19] The decision in *Aguilar* was based on a concern that public school teachers engaged in secular education would be influenced, wittingly or unwittingly, by the

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[19] The dissenters in *Aguilar* notably did not take issue with the Court's characterization of the religious schools in New York as "pervasively sectarian," 473 U.S. at 412. Rather, the dissenters emphasized that there was no demonstrated reason to conclude that "a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school." *Id.* at 427 (O'Connor, J., dissenting).

surroundings of a religious school, and that close supervision of the religious school would be necessary to ensure that this did not occur. But as we have explained, there is no basis in the record for the counterfactual hypothesis that public school teachers would lapse into subtle religious indoctrination. Further, any oversight of teachers to ensure that their instruction remains secular would not require interference with the religious mission of the schools, since a public school authority need only supervise its own employees—not the parochial schools—to make sure that the state keeps clear of church affairs.[20]

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[20] If the Court should conclude that further evidence or findings would be appropriate regarding the circumstances of the Title I program as it is or would be administered in New York, the Court could vacate the judgment of the court of appeals and remand the case with instructions to the district court for further proceedings on petitioners' Rule 60(b) motion under the principles announced in the Court's decision.

CONCLUSION

The Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), should be overruled. Accordingly, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions to vacate the injunction.

Respectfully submitted.

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FEBRUARY 1997

APPENDIX

TITLE I, PART A
POLICY GUIDANCE

IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

[SEAL OMITTED]

U.S. DEPARTMENT OF EDUCATION
Office of Elementary and Secondary Education
Compensatory Education Programs

April 1996

* * * * *

PROVIDING SERVICES TO ELIGIBLE PRIVATE SCHOOL CHILDREN

* * * * *

[p. 13]

Q5. If a school in the attendance area in which eligible private school students reside is operating a schoolwide program, are private school students to be offered a schoolwide program?

A. No. Because private schools are not eligible for Title I services, schoolwide programs may not be operated in private schools. However, eligible private school children residing in an area served by a schoolwide program school must be offered equitable services.

Q6. May an LEA provide services to private school children that are not equitable to those provided to public school children, if, after receiving an offer of equitable services, the private school officials or parents choose to have the children participate in only some of the services?

A. The statute requires that an LEA offer equitable services to private school children; it does not require that private school children accept or participate in all those services. If private school officials or parents choose to have their children participate in only some of those services, and decline participation in others, the LEA will have met its responsibility by providing those services in which private school children wish to participate. LEAs should continue to offer equitable services in future years, however, rather than offering only those services in which children participated in the past.

Q7. When a child residing in a Title I attendance area in one LEA attends a private school in another LEA, which LEA, if any, is responsible for service the child?

A. The LEA in which the child resides is responsible to provide services for the child. The LEA may, however, arrange to have services provided by another LEA, reimbursing that LEA for costs.

Q8. May an LEA establish a minimum number of private school children selected for the program in order to establish a Title I program near the private school? If so, what is the LEA's responsibility to serve children attending private schools with fewer than that minimum number?

A. Section 1120(a) of Title I requires that LEAs provide for the participation, on any equitable basis, of eligible children enrolled in private schools. The requirement applies regardless of the number of children attending a private school. However, when the number of eligible children at one location is very small, the cost of establishing certain types of programs to serve them may be prohibitive, especially when these children may be from several grades or have different educational needs. In this case, other options should be considered. For instance, if it is feasible and equitable, LEAs may adopt methods, such as take-home computer programs, individual tutoring programs, or professional development activities.

* * * * *

Nos. 96-552 and 96-553

Supreme Court, U.S.
FILED
FEB 28 1997
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS RACHEL AGOSTINI, ET AL.

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QUESTIONS PRESENTED

1. Whether this Court should overrule its decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), which held that the Establishment Clause prohibits the furnishing of Title I remedial services to eligible parochial school children in the same setting as their public school counterparts—on the premises of the schools they attend.

2. Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief petitioner seeks.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were:

Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side and Allen H. Zelon, plaintiffs;

the Chancellor of the Board of Education of the City of New York and Board of Education of the City School District of the City of New York, defendants;

the Secretary of the United States Department of Education, defendant; and

Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then and Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens and Rosemarie Vasquez, defendant-intervenors.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Nos. 96-552 and 96-553

RACHEL AGOSTINI, *et al.*, *Petitioners*,

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR PETITIONERS RACHEL AGOSTINI, ET AL.

OPINIONS BELOW

The Memorandum and Order of the district court is unreported and is reproduced in the Appendix to the Petition for a Writ of Certiorari (hereinafter "Pet. App.") at 1a. The court of appeals' Summary Order is unreported and reproduced at Pet. App. 11a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 30, 1996. The petition for a writ of certiorari was filed with this Court on October 7, 1996 and granted on January 17, 1997. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....

Rule 60(b) of the Federal Rules of Civil Procedure provides in relevant part:

> (b) . . . On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . .

STATEMENT

When this case was last before this Court, the Court held that the Establishment Clause prohibits the furnishing of Title I remedial educational services to eligible school children on the premises of church-related schools. *Aguilar v. Felton,* 473 U.S. 402 (1985). Specifically, the Court ruled that providing Title I services to parochial schoolchildren in their regular school buildings gave rise to excessive entanglement of church and state.

After that decision, school boards in New York City and throughout the country struggled to find alternative methods of delivering Title I services to eligible children attending church-related schools—alternatives that have proven to be both more expensive and less effective than on-premises instruction.

At the same time, this Court has retreated from the interpretation of the Establishment Clause that prevailed in *Aguilar*—to the point that five Members of the Court have expressly called for *Aguilar's* overruling or invited its reconsideration. *See Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 717 (O'Connor, J., concurring in part and concurring in the judgment), 731 (Kennedy, J., concurring in the judgment), 750 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (1994). Petitioners now ask this Court to reject the incoherent "entanglement" analysis employed in *Aguilar*, to apply the teachings of its more recent cases, and to overrule *Aguilar* once and for all.

A. Title I

Title I of the Elementary and Secondary Education Act of 1965 was the centerpiece of a congressional effort to "bring better education to millions of disadvantaged youth who need it most." S. Rep. No. 89-146 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1446, 1450. Having determined that "there is a close relationship between conditions of poverty and lack of educational development," *id.*, Congress passed Title I to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families. By enabling local educational agencies to expand and improve their programs for meeting the special educational needs of economically and educationally deprived

children, this legislation was to be a "very potent instrument . . . in the eradication of poverty and its effects." *Id.*[1]

The program enacted in 1965 has remained in effect, under the name Title I or Chapter 1, for over three decades.[2] Throughout that period it has been the federal government's largest and most important commitment to elementary and secondary education,[3] with appropriations in fiscal year 1995 totaling $7.4 billion. 20 U.S.C. § 6302(a).

Title I grants are provided to qualifying state educational agencies, which in turn distribute the funds to eligible local educational agencies ("LEAs"), which have the responsibility for managing Title I programs. 20 U.S.C. §§ 6302(a), 6332-35. In New York City, the local educational agency is the Board of Education of the City of New York.

To be eligible for Title I remedial services, a child must be both economically and educationally disadvantaged. A child is economically disadvantaged if he resides in an area that has a high concentration of low-income families. 20

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[1] The early history of Title I is discussed in this Court's opinion in Aguilar, 473 U.S. at 404-06 & nn.1-3.

[2] The program was reenacted as Chapter 1 of the Education Consolidation and Improvement Act, part of Pub. L. No. 97-35, 95 Stat. 357, 464 (1981), and later as Chapter 1 of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130. In 1994, pursuant to the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified in relevant part as 20 U.S.C. §§ 6301-38), Congress renamed the Chapter 1 program Title I, Part A [hereinafter "Title I"]. Today's Title I program is identical to its predecessors in all respects relevant to this case.

[3] *See* 60 Fed. Reg. 34,800 (1995); H. Rep. No. 103-425 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2807, 2810 ("Title I . . . [is] the largest federal elementary and secondary educational program.").

U.S.C. § 6313. He is educationally disadvantaged if he is progressing at a level below normal for his age. 20 U.S.C. § 6315(b).

Children attending both public and private schools are eligible for Title I remedial services, if they meet the statutory criteria of economic and educational disadvantage. 20 U.S.C. §§ 6313, 6315(b), 6321. Eligibility is determined without regard to the religious affiliation of the student or the school he attends. Federal law, in fact, requires that instructional services be provided to private school students "on an equitable basis" with their public school counterparts. 20 U.S.C. § 6321(a); C.F.R. § 200.10(a)-200.11 (1996); 34 C.F.R. § 200.52(b) (1994).

Title I funds, however, may not be used to meet the "needs of the private school" itself or the "general needs of children in the private school." 34 C.F.R. § 200.12(b) (1996). Title I funds may be used only for services that supplement, and do not supplant, services otherwise available from nongovernmental sources. 20 U.S.C. § 6322(b); 34 C.F.R. 200.12(a) (1996). And all Title I services must be "secular, neutral, and nonideological." 20 U.S.C. § 6321(a)(2).

Consistent with these general requirements, the LEA must keep title to and exercise administrative control over all equipment and supplies acquired with Title I funds. 34 C.F.R. § 200.13(a) (1996).

Prior to *Aguilar*, educational services were permitted to be provided on the premises of a private school,[4] but only "[t]o the extent necessary to provide equitable [Title I]

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[4] In *Wheeler v. Barrera*, 417 U.S. 402, 422 (1974), this Court noted that Congress had anticipated that "one of the options open to the local agency in designing a suitable program for private school children was the provision of on-the-premises instruction."

services," and, again, only if these services were "not normally provided by the private school." *Id.* § 200.73 (1983). *See also* S. Rep. No. 89-146, at 12. If the LEA chose to provide Title I services on private school premises, it was required to "ensure that the equipment or supplies placed [there] . . . are used for [Title I] purposes." 34 C.F.R. § 200.74(c)(1) (1983).

The basic educational composition of Title I services for private school students has remained essentially unchanged since 1965. Instruction is provided in reading, mathematics and English as a second language. Title I also provides clinical and guidance services to eligible children. Joint Appendix (hereinafter "JA") 311.

B. Implementation of Title I Before *Aguilar*

In 1966, after the enactment of Title I, the Board of Education of the City of New York (the "Board") began to provide remedial educational services to economically and educationally disadvantaged students in both public and private schools. Initially, New York City attempted to provide the services after regular school hours—first, on public school premises and, later, on private school premises. Both of these after-hours experiments failed. Attendance was poor. Students were unreceptive. Teachers were tired. Parents were concerned about the safety of their children traveling home after dark or in inclement weather. Communication between Title I teachers and regular classroom teachers, which is vital in remedial education, was all but impossible. JA 63-64, 312.[5]

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[5] An investigative team of the Office of Education of the United States Department of Health, Education, and Welfare found similar problems in 1976 in an after-hours Title I program in Missouri. JA 34-37.

Faced with these problems, the Board concluded in August 1966 that the only practical method of meeting its obligation to provide private school children with equitable Title I services was to provide those services in the same fashion in which they were delivered to public school students—during regular school hours in classrooms located in the students' regular schools. JA 64-66, 312. That method of providing Title I services continued until this Court's decision in *Aguilar*.[6]

Under the pre-*Aguilar* program, teachers employed by the Board went to the private schools solely to provide Title I instruction to eligible students. *See Aguilar v. Felton*, 473 U.S. at 406. Every teacher and professional in New York's private school Title I program was given detailed written and oral instructions that (1) they were employees of the Board and were accountable only to their public school supervisors, not to any private school officials; (2) they had sole responsibility for selecting students for the Title I program and would teach only children who meet the eligibility criteria for Title I aid; (3) their materials and equipment would be used only in the Title I program; (4) they could not engage in team-teaching or other cooperative instructional

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[6] Throughout the pre-*Aguilar* period, the Board had continued to examine the option of off-premises Title I instruction for private school students. A study conducted by City school officials in the 1977-1978 school year concluded that if Title I services were provided to private school children at public schools, more than 40 percent, or $4.2 million, of the total budget for the private school Title I program would have to be diverted to such non-instructional costs as transportation, security, and building maintenance. It was anticipated that such a diversion of funds would require the elimination of 167 teaching positions in the private school Title I program and the elimination of instructional services to 36 percent, or 5,000, of the private school students who participated in the Title I program during the 1977-1978 school year. JA 66-68.

activities with private school teachers;[7] and (5) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. JA 50-51. Comparable guidelines are in place today to secure the secular quality of Title I instruction to religious school students. JA 643.

In *Aguilar*, the appellees (respondents here) presented no evidence whatsoever that any of these guidelines had ever been violated since the inception of the on-premises program in 1966. In particular, there was no evidence that any Title I teacher had ever injected religious content into any Title I class or ever engaged in any religious activity while at a private school. JA 55.

Prior to 1985, pursuant to instructions given by the Board to participating nonpublic schools, Title I teachers used classrooms that were specifically designated for Title I instruction and that were free of any religious symbols. JA 59. The nonpublic schools were not reimbursed for classroom space. The material used in the classes had no religious content. JA 56. The Board retained title to the materials and equipment used in Title I classes. Teachers kept the materials locked in storage cabinets when they were not in use, and the materials were subject to an annual inventory. JA 56-57.

Contacts between Title I administrators and private school officials were (and are) routine in character and limited to

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[7] A remedial program can be effective only if the remedial teacher consults with the regular classroom teacher to determine the student's particular needs and to check his classroom progress in the subject in which he is receiving remediation. While Title I teachers are told such consultations are permissible, they are instructed to confine them to mutual professional concerns about their students' educational needs and not to discuss any matters of a religious nature. JA 51-52; 646-47.

three general categories—dissemination by Title I administrators of basic information about the program, submission by private school principals of standard requests for Title I services, and responses by Title I administrators to routine inquiries from private school officials about scheduling and the like. JA 59-61. No evidence was presented in *Aguilar* to suggest that these administrative contacts had involved Title I administrators in the curricula or internal operations of the private schools, or that private school officials had attempted to exercise any control at all over the Title I program.

C. *Aguilar* and Its Aftermath

In 1978, respondents challenged the provision of Title I services to students inside religiously affiliated schools as a violation of the Establishment Clause. The district court rejected the challenge,[8] but the court of appeals reversed. *Felton v. Secretary*, 739 F.2d 48 (2d Cir. 1984). The court of appeals described New York's Title I program as one "that apparently has done so much good and little, if any, detectable harm." *Id.* at 71. The court of appeals, however, felt compelled by this Court's decision in *Meek v. Pittenger*, 421 U.S. 349 (1975), to find that the program violated the Establishment Clause.

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[8] The district court agreed with the three-judge court in *National Coalition for Public Education & Religious Liberty ("PEARL") v. Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980), which had upheld New York City's on-premises program. The plaintiffs in that case had sought review in this Court, but the jurisdictional statement was filed out of time and the appeal was dismissed for want of jurisdiction. 449 U.S. 808 (1980). These plaintiffs then renewed their challenge in this case, and the parties stipulated that the case should be decided on the evidentiary record developed in *PEARL*, along with two affidavits updating the record.

This Court affirmed, holding that delivery of Title I services on the premises of sectarian schools gave rise to an excessive entanglement of church and state. Upon remand, the district court enjoined the U.S. Secretary of Education and the Chancellor of the Board from providing Title I services on the premises of sectarian schools. Pet. App. 14a.[9]

The decision in *Aguilar* threw New York's Title I program—and Title I programs around the country—into turmoil. The decision forced the City of New York to implement alternative methods of delivering Title I services to parochial school children. The alternatives included the use of public school classrooms, mobile instructional units or vans, leased sites, and computer-assisted instruction in the parochial schools. Substantially similar alternative methods were implemented in other school districts around the country.

These post-*Aguilar* Title I delivery methods are vastly more expensive than the on-premises instruction that was prohibited in *Aguilar*. In New York City alone, the additional cost of providing Title I services by way of these alternative methods has been approximately $15 million per year. The total cost of compliance with *Aguilar* in New York City alone has been well in excess of $100 million to date.[10]

The post-*Aguilar* delivery methods are also educationally inferior to on-premises instruction by Title I teachers. Eligible students in parochial schools are required to leave

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[9] *Felton v. Secretary*, 78 CV 1750 (ERN) (E.D.N.Y., Sept. 26, 1985) (Pet. App. 14a), *aff'd*, 787 F.2d 35 (2d Cir. 1986).

[10] JA 336 (approximately $15 million per annum), 345 ($87 million through 1993-94); Pet. App. 18a ($16 million for 1995-96).

their school buildings to receive the instruction they need. That results in disruption and lost instructional time, which is something that these students—the very ones who are experiencing the greatest difficulty keeping up with their regular instruction—can ill afford.[11] Students who receive computer-assisted instruction in their regular school building avoid the disruption and loss of instruction time, but are denied the advantages of face-to-face contact with a teacher. JA 331.

D. The Decisions Below

In late 1995, these petitioners, parents of parochial school children receiving Title I instruction, and the Chancellor of the Board filed separate motions pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from the judgment that was entered pursuant to this Court's decision in *Aguilar*. As the Establishment Clause is currently understood and applied, the movants argued, there is no constitutional impediment to providing Title I services to parochial school children in the same setting in which their public school counterparts receive the same services—in their regular school buildings. The movants noted that five Justices had called for the overruling or reconsideration of *Aguilar*, and argued that subsequent decisions of the Court were in fact inconsistent with *Aguilar*.

The district court concluded that the movants had properly invoked Rule 60(b)(5) to seek relief from a continuing injunction based on a change in the governing law. Pet. App. 9a-10a. It observed that "[i]n the years since the Supreme Court's *Aguilar* decision, the landscape of Establishment Clause decisions has changed," and that "it is

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[11] JA 329-30; *see also* S. Rep. No. 100-222 at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 101, 114 (noting disruptive effects of post-*Aguilar* delivery methods).

at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now." Pet. App. 4a, 7a-8a. The court concluded that the movants

> should be permitted to seek the reconsideration of *Aguilar* that a majority of the Supreme Court appears willing, if not anxious, to undertake. In addition, there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision.

Pet. App. 10a. The district court denied the motion on the merits, and the court of appeals affirmed "substantially for the reasons stated in Judge Gleeson's Memorandum and Order." Pet. App. 13a.

SUMMARY OF ARGUMENT

I. This Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 8 (1993). Title I is the paradigm of a religion-neutral program. Purely secular services are made available directly to disadvantaged school children, whatever their religion and wherever they attend school.

The reason why a program like Title I is not "readily subject to an Establishment Clause challenge," *id.*, is that such a program "respect[s] . . . both the Free Exercise and the Establishment Clauses" by "pursu[ing] a course of 'neutrality' toward religion." *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973). Title I is scrupulously neutral toward religion, and an

important element of its overall neutrality is that services be offered to all eligible school children in the same convenient and effective setting—where they attend school.

Neutrality or evenhandedness may not be sufficient to save a program of government aid that directly funds or subsidizes religious activity. *See Rosenberger v. Rector of the Univ. of Virginia*, 115 S. Ct. 2510, 2523 (1995); *id.* at 2540-44 (Souter, J., dissenting). But Title I does not directly fund religious activity. It does not even indirectly subsidize religious activity. It provides purely secular services directly to eligible school children, and it does not take the place of any instruction provided by the school. JA 660-61, 685-86.

Aguilar held that on-premises Title I services violated the "excessive entanglement" prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But since *Aguilar* was decided, the entanglement prong has been criticized by the Court for precisely the "Catch-22" quality that it had in *Aguilar*: "the very supervision of the aid to assure that it does not further religion renders the statute invalid." *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988).

The entanglement prong should be abandoned as an independent test under the Establishment Clause. It rests on an ideal of total separation of church and state that is unnecessary to a faithful application of the religion clauses, and it undermines the notion of neutrality that is necessary to a proper understanding of those clauses. As a result of entanglement analysis, groups or individuals with religious affiliations are excluded altogether from programs that are intended for the benefit of all citizens or, as in *Aguilar*, they are denied participation on equal terms.

The entanglement test suffers from other defects as well. By inviting the courts to rely upon speculation, rather than evidence, about the effects of the government's contact with

religion, the test sets aside the ordinary burden of proof that requires the plaintiffs to *prove* their legal claims. And by focusing on the inhibiting effects those contacts might have on the free exercise of religion *by church adherents*, the test addresses potential claims that the plaintiffs lack standing to assert.

Even if the entanglement test retains vitality, the Court should overrule the entanglement holding in *Aguilar* as an unwarranted and illogical extension of *Lemon*. *Lemon* was based on the fear that *full-time parochial school teachers* subsidized by the state might inject religion into their classes; it held that the supervision of those *parochial school teachers* by the state constituted excessive entanglement of church and state. But there is no comparable risk that *publicly employed* Title I teachers would inject religion into their secular classes. And, even more obviously, any supervision to guard against such an event could not conceivably constitute excessive entanglement of church and state because, unlike *Lemon*, the supervision is of a *public employee* by another public employee. In short, the supervisory relationship is not between church and state at all, but between state and state.

II. Rule 60(b) is the established procedural vehicle for seeking relief from the prospective effects of a continuing injunction, and there is nothing that rendered that vehicle inappropriate in this case. The courts have inherent power to modify or vacate their injunctions, and that power is no less applicable when entry of the injunction has been affirmed or directed by this Court. This Court so held in *Standard Oil Co. v. United States*, 429 U.S. 17 (1976).

The motions in this case were prompted by the extraordinary financial strains caused by the injunction and by the substantial legal changes reflected in this Court's intervening Establishment Clause cases. A majority of this

Court had invited a request to reconsider *Aguilar* in a proper case. *Kiryas Joel*, 512 U.S. at 717, 731, 750. And, as the courts below noted, it is difficult to think of a more appropriate case in which to request reconsideration of that decision than the very case in which the parties are subject to its direct and continuing effects.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT OFFERING TITLE I REMEDIAL SERVICES ON THE PREMISES OF CHURCH-RELATED SCHOOLS

A. Title I Provides Purely Secular Benefits on a Religiously Neutral Basis.

"Neutrality is what is required" by the Establishment Clause—neither endorsement nor hostility, neither favoritism nor discrimination, but neutrality. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976) (opinion of Blackmun, J.) It is a "proper respect for both the Free Exercise and the Establishment Clauses [that] compels the State to pursue a course of 'neutrality' toward religion." *Nyquist*, 413 U.S. at 792-93. For it is only by maintaining "impartiality, not animosity, toward religion," *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring), that the government can fully protect the object of the religion clauses—the right to believe or not to believe as one chooses.

With *Aguilar* as a notable exception, this Court has for the most part adhered to these principles. "A central lesson of [the Court's] decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger*, 115 S. Ct. at 2521.

"[T]he Establishment Clause's concept of neutrality" may not be "self-revealing." *Lee v. Weisman*, 505 U.S. 577, 627

(1992) (Souter, J., concurring). But there has never been any doubt about one of its central meanings: neutrality toward religion is promoted when government benefits are made available generally to a broad class of citizens defined without reference to religion.

That principle was decisive in two of the Court's earliest Establishment Clause decisions. In *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), the Court upheld the provision of bus transportation to public and nonpublic school children alike, explaining that the Establishment Clause "do[es] not . . . prohibit [the state] from extending its general state law benefits to all its citizens without regard to their religious belief." And in *Board of Education v. Allen*, 392 U.S. 236, 243 (1968), the Court permitted the lending of textbooks to students in church-related schools, because "[t]he law merely makes available to all children the benefits of a general program to lend school books free of charge."[12]

This particular aspect of neutrality has been central to the Court's more recent decisions as well. *See, e.g., Board of Education v. Mergens*, 496 U.S. 226 (1990) (upholding the Equal Access Act, which guaranteed student religious groups equal access to school facilities to conduct their meetings); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S.

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[12] *Allen* was decided on the same day as *Flast v. Cohen*, 392 U.S. 83 (1968), in which the Court held that taxpayers have standing to raise Establishment Clause challenges to government programs. One of the programs at issue was Title I. After winning the right to bring an Establishment Clause challenge to Title I, however, the plaintiffs in *Flast* abandoned their challenge on the merits, no doubt because *Allen* signaled that the Court would reject such a challenge. That the plaintiffs were successful 17 years later in *Aguilar* was due to the Court's temporary departure from, or failure to observe, the neutrality principle articulated in *Allen* and *Everson*.

481, 487 (1986) (rejecting Establishment Clause challenge to a state's extending vocational rehabilitation assistance to a blind person studying at a religious college, because the assistance was provided to the student, not the school, and the "program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted") (quotation omitted); *Mueller v. Allen*, 463 U.S. 388, 397 (1983) (upholding tax deduction for educational expenses, because "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools") (emphasis in original); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (upholding a school "policy of equal access, in which facilities are open to groups and speakers of all kinds").

Thus, in *Kiryas Joel*, the Court confirmed that "the [neutrality] principle is well grounded in our case law as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." 512 U.S. at 704.

Most recently, the neutrality principle assumed dispositive importance in *Rosenberger*. In that case, the Court upheld —in fact ordered—public university funding of the printing costs of a religious newspaper, because such funding was made available generally to qualifying student groups. The Court emphasized that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." 115 S. Ct. at 2521.

The neutrality principle applies without question in a case like this one, in which *purely secular* services are provided

directly *to students*. The majority and dissent in *Rosenberger* differed over whether that case involved a direct subsidy of a religious organization, but there is no such question in this case.[13] In this case, all that is sought is the provision to students of purely secular services that cannot be diverted for a religious purpose. The dispute is not whether the services can be offered, but only where.

The answer to that question is suggested by this Court's decision in another recent case, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). In *Zobrest*, the Court found no constitutional barrier to a public school district's providing a sign-language interpreter for a parochial student on the premises of the parochial school. Central to the Court's reasoning was the fact that "[t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any [qualified] child . . . without regard to the 'sectarian-nonsectarian, or public-non-public nature' of the school the child attends." *Id.* at 10. The Court noted that it had "never said that 'religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs,'" *id.* at 8 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988)), and that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school," *id.* at 13. The Court reasoned:

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[13] The dissenters in *Rosenberger* took the position that neutrality, or "evenhandedness," was not dispositive when, as they saw the case, direct public funding of religious activities was involved. 115 S. Ct. at 2540-44. But under the dissenters' analysis, evenhanded distribution of secular benefits to students, whose individual choices determine whether a church-related institution receives an indirect benefit, does not offend the Establishment Clause. *Id.* at 2541-42. That is the case here, assuming that there is any indirect benefit at all. *See* pp. 23-24, *infra*.

> When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," it follows under our prior decisions that provision of that service does not offend the Establishment Clause.

Id. at 10 (quoting *Witters*, 474 U.S. at 488). It did not matter that the religious school might derive some indirect advantage from such a program, the Court explained:

> We have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Id. at 8.

Title I is a "general program that 'is in no way skewed towards religion.'" *Id.* at 10. Its benefits are purely secular, and they are provided "neutrally . . . to a broad class of citizens defined without reference to religion." *Id.* at 8. It follows that Title I services, wherever they are provided, "are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated benefit." *Id.* Why? Because such a program affirmatively promotes the values of neutrality and religious freedom that underlie both of the First Amendment's religion clauses. Providing benefits to students "without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends" creates "no financial incentive for parents to choose a sectarian school." *Id.* at 10. Parents are neither encouraged nor discouraged to send their children to a church-related school. Religion is neither favored nor disfavored. Everyone can choose a religious education or a non-religious one, without suffering any penalty or receiving any reward. When the government designs such a program,

it acts in the best tradition of religious tolerance and neutrality.

The particular feature of Title I that is at issue in this case—on-premises services—is an important element of Title I's overall neutrality. Federal law requires that Title I instructional services be provided to private school students "on an equitable basis" with their public school counterparts. 20 U.S.C. § 6321(a); 34 C.F.R. § 200.10(a)-200.11 (1996); 34 C.F.R. § 200.52(b) (1994).[14] After experimenting unsuccessfully with alternative methods of providing Title I services to private school children, the New York City Board of Education concluded that the only practical method of providing equitable services to private school children was to provide those services on-site, just as they were provided to eligible public school children. JA 63-64. As a practical matter, the alternatives had proved unworkable and ineffective, with the result that "nonpublic school students were not receiving Title I benefits comparable in scope and quality to those received by public school students." JA 64. So too today, requiring private school students to leave their schools in the middle of the school day to receive remedial instruction results in disruption and lost instructional time for the very students who can least afford it. JA 329-30.

Denying children who attend a religious school the same arrangements that are available to their public and non-religious school counterparts offends the value of neutrality and evenhanded treatment. As Justice O'Connor has noted: "If the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair

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[14] This requirement essentially codifies this Court's holding in *Wheeler*, 417 U.S. 402, which construed earlier Title I regulations to require that eligible parochial school students receive services "comparable" to those given to public school students.

that it provides it on-site at sectarian schools as well." *Kiryas Joel*, 512 U.S. at 717.

In sum, providing Title I services to eligible schoolchildren on the premises of the religious schools they attend does not offend, but respects, the requirement of religious neutrality that is central to the First Amendment religion clauses. And as demonstrated below, providing Title I services to those students on-site does not present any of the other Establishment Clause concerns that have been identified in the opinions of this Court or its individual Justices.

B. Title I Does Not Directly Fund Or Indirectly Subsidize Religious Activity

1. *Direct Funding*

This Court has "recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Rosenberger*, 115 S. Ct. at 2523. But there are no direct money payments to sectarian institutions in this case. Payments under Title I are to the LEA, in this case the New York City Board of Education. The services that are purchased with Title I funds are purely secular, and those services are provided directly to students, not to the schools they attend.

Like *Zobrest*, this case is "an even easier case than *Mueller* and *Witters* [which involved, respectively, tax deductions and vocational assistance] in the sense that . . . no funds traceable to the government ever find their way into sectarian schools' coffers." *Zobrest*, 509 U.S. at 10. And this case is even easier than *Zobrest*, which upheld the use of a publicly paid interpreter even during religion class, because the services here do not assist even indirectly in the communication of a religious message.

In *Rosenberger*, the dissenters thought that the payments at issue violated the principle against "direct public funding of core sectarian activities." 115 S. Ct. at 2540. But there is no such issue in this case. Title I instruction is a purely secular activity, entirely devoid of religious content.

2. *Indirect Subsidization*

It is "well established . . . that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." *Nyquist*, 413 U.S. at 771; *see also Roemer*, 426 U.S. at 747; *Hunt v. McNair*, 413 U.S. 734, 742-43 (1973). "Thus, the Court has never accepted the mere possibility of subsidization [of a religious institution] . . . as sufficient to invalidate an aid program." *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 394 (1985). "The question in each case," the Court explained in *Grand Rapids*, "must be whether the effect of the proffered aid is 'direct and substantial,' . . . or indirect and incidental." *Id.*

In *Grand Rapids*, the Court found that the effect of state-sponsored instruction in the sectarian schools was "direct and substantial." In *Zobrest*, however, the Court distinguished *Grand Rapids* and *Meek v. Pittenger*, 421 U.S. 349 (1975), on the ground that those cases involved "direct grants of government aid [that] relieved sectarian schools of costs they otherwise would have borne in educating their students." 509 U.S. at 12. As the Court explained, "the religious schools in *Meek* received teaching material and equipment from the State, relieving them of an otherwise necessary cost of performing their educational function." *Id.* And in *Grand Rapids*, the Court explained, the programs "'in effect subsidized the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.'" *Id.* (quoting *Grand Rapids*, 473 U.S. at 397).

Title I bears no resemblance to those programs. Unlike the program in *Meek* that was regarded as subsidizing the schools,[15] Title I provides no material or equipment to the schools. Unlike the programs in *Grand Rapids*, Title I instruction in private schools is not provided to all students, but only to those who meet the statutory criteria of economic and educational disadvantage. 20 U.S.C. §§ 6313, 6315(b).[16] And the instruction is limited to special remedial instruction that does not take the place of any instruction provided by the school. *See* 20 U.S.C. § 6322(b); 34 C.F.R. § 200.12(a) (1996).[17] Title I, in short, does not "tak[e] over a substantial portion of the [schools'] responsibility for teaching secular subjects." *Grand Rapids*, 473 U.S. at 397.

In sum, parochial schools do not receive any "direct and substantial" benefit from Title I. *Id.* at 394. Any benefit they may receive is "indirect," "remote" and "incidental." *Id.* at 393. It is limited to the possibility that parents of children in need of remedial help might find it easier to choose a parochial school if by making that choice their

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[15] As discussed below, *Meek* also involved a program of "auxiliary services" that was invalidated purely on entanglement grounds. *See* note 31, *infra*.

[16] Fewer than one out of seven children in the Catholic schools of New York City receive Title I services. In those Catholic schools in which some of the children receive Title I services, approximately two out of seven do. JA 659, 684.

[17] Uncontroverted affidavits submitted in connection with the initial motions for summary judgment in *Aguilar* and again in connection with the Rule 60(b) motions establish that the Catholic schools in New York City have not offered the types of services that are available under Title I, and that Title I did not replace any of those schools' educational offerings. JA 660-61, 665, 685-86, 690.

children do not lose their eligibility for Title I services. The benefit to the school, if any, is "attenuated," *Zobrest*, 509 U.S. at 8, 12, and it comes "only as a result of the genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 487; *Rosenberger*, 115 S. Ct. at 2541 (Souter, J., dissenting).

C. Providing On-Site Title I Services To All Eligible Schoolchildren Does Not Constitute An Endorsement of Anyone's Religion

Precisely because of its strict religious neutrality, Title I effects no endorsement of religion. Eligible schoolchildren receive services without regard to their religion or the religious affiliation of the schools they attend, and the government, therefore, does not "convey a message that religion or a particular religious belief is *favored* or *preferred*." *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)) (emphasis supplied by Court in *Allegheny*). Title I does not make "adherence to a religion relevant in any way to a person's standing in the political community." *Allegheny*, 492 U.S. at 594 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). In form and in substance, Title I makes religion irrelevant.

In *Grand Rapids*, the Court concluded that the instructional services offered by the state effected a "symbolic union of church and state" that was "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." 473 U.S. at 390. As noted above, however, the programs at issue in *Grand Rapids* were materially different from Title I. Of particular relevance to the notion of "symbolic union," one of the two programs at issue in *Grand Rapids* hired full-

time teachers in the sectarian schools to teach community education courses in the same schools. In short, the public and private programs were "united" in a single set of teachers. Although the teachers in the other program were full-time public employees, they were so integrated into the sectarian school's program that "the religious school students spen[t] their typical schoolday moving between religious school and 'public school' classes," *id.* at 391, with the result that "ten percent of any given nonpublic school student's time during the academic year would consist of Shared Time instruction," *id.* at 375 (quotation omitted).

Whatever might be thought of the programs and decision in *Grand Rapids*, Title I does not signal "endorsement" or "disapproval" of anyone's "individual religious choices." *Id.* at 390. "[T]he endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Capitol Square Review & Advisory Bd.*, 115 S. Ct. 2440, 2452 (1995) (O'Connor, J., concurring in part and concurring in the judgment). "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Id.* at 2454 (quotation deleted). Both "the history and administration of a particular practice" must be examined. *Id.*

No one familiar with "the history and administration" of Title I could conceivably construe it as an endorsement or a disapproval of religion. Anyone who is even minimally informed about the purely secular and supplementary character of the services, the religious neutrality of the eligibility criteria, the noninvolvement of religious school

personnel in the administration of the program,[18] and the fact that the overwhelming majority of the funds are spent on public school students[19] would recognize that Title I, as conceived and as administered, is religiously neutral.

Offering Title I services on-site to eligible religious school children does not destroy that neutrality, nor does it send a message of endorsement to a reasonable, informed observer. Such an observer would know the history of the City's failed attempts to provide services to eligible private school students off-premises. And such an observer would know that services were being offered on-site not to favor anyone, but to treat everyone the same. In sum, a reasonable, informed observer would understand that the government is simply trying to find efficacious ways to improve the lot of all children who are economically and educationally disadvantaged—and, in the process, sending a "message . . . of neutrality rather than endorsement." *Mergens*, 496 U.S. at 248 (O'Connor, J.).[20]

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[18] There is, of course, a degree of cooperation and coordination between Title I teachers and the children's regular teacher, JA 59-63, 331-32, but the "State requires sectarian organizations to cooperate on a whole range of matters without thereby . . . giving the impression that the government endorses religion." *Aguilar*, 473 U.S. at 430 (O'Connor, J., dissenting).

[19] Over 90% of the students who receive Title I services attend public schools. JA 310, 605-06.

[20] If providing Title I services on-site were thought to be an endorsement of religion or an impermissible "symbolic union of church and state," then a whole host of accepted practices would be unconstitutional as well, and a great many of this Court's own precedents would have to be overturned. *E.g.*, *Everson*, 331 U.S. 1 (upholding provision of school bus service to parochial school students); *Wolman v. Walter*, 433 U.S. 229 (1977) (upholding provision of diagnostic speech, hearing and psychological services by public employees in religious schools); *Widmar*, 454 U.S. 263 (upholding use of school facilities by religious

D. Title I Does Not Coerce Participation in Religious Activity

The government may not "coerce anyone to support or participate in religion or its exercise." *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part). No one has ever suggested that Title I has such a coercive effect.

E. "Excessive Entanglement of Church and State" Is No Basis to Invalidate On-Site Provision of Purely Secular Title I Services

The ultimate question in this case, as in *Aguilar*, is whether a religiously neutral program of secular benefits, which neither directly funds nor indirectly subsidizes religious activity, and which neither endorses nor coerces religious belief, nevertheless establishes religion because it involves administrative contact with religious school authorities. *Aguilar* answered that question in the affirmative. But its answer rested on a baseless interpretation of the Establishment Clause and a misconception of Title I. *Aguilar's* holding that providing on-site Title I services involves unconstitutional entanglement between the government and religion should be overruled.

The entanglement holding of *Aguilar* had three parts. First and foremost, *Aguilar* held that "the supervisory system established by the City of New York" to ensure that Title I teachers do not "intentionally or inadvertently" teach religion in their Title I classes "inevitably results in the excessive entanglement of church and state." 473 U.S. at 409. Second, the Court held that the "administrative cooperation" that is required between Title I teachers and school officials

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group when facilities generally available on neutral basis); *Mergens*, 496 U.S. 226 (same).

would produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." *Id.* at 413-14 (quotation omitted). And third, the Court held that the City's need to make judgments about the program presented "dangers of political divisiveness along religious lines." *Id.* at 414. None of those fears was grounded in a proper understanding of the Establishment Clause or in a reasonable understanding of how Title I operates.

1. *"Entanglement" does not, by itself, violate the Establishment Clause*

The three-part test enunciated in *Lemon* has been widely criticized,[21] and a majority of this Court has acknowledged the criticism.[22] The entanglement prong upon which *Aguilar* was based has been subject to particular criticism,

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[21] *See, e.g.*, Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795 (1993); McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 127-34 (1992); Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645, 654-60 (1992); Glendon & Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 503, 538 (1991); Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 Cornell L. Rev. 905, 908, 935 (1987); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 681 (1980); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3 (1978).

[22] *See, e.g., Kiryas Joel*, 512 U.S. at 720-21 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 750-51 (Scalia, J., dissenting); *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. at 656 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring in judgment); *Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting).

not only by commentators and individual Justices, but by the Court itself.

Principal among the criticisms of the entanglement prong is that it "forbids what the 'effects' prong requires."[23] This Court has acknowledged that "Catch-22" quality of entanglement analysis. Speaking of *Aguilar* in particular, the Court observed: "the very supervision of the aid to assure that it does not further religion renders the statute invalid. For this and other reasons, the 'entanglement' prong of the *Lemon* test has been much criticized over the years." *Bowen v. Kendrick,* 487 U.S. at 615-16 (citations omitted).[24]

It is not simply the internal tension between the effects and entanglement prongs that is the problem. It is the entanglement prong's inconsistency with the underlying purpose of the religion clauses. Entanglement analysis, as exemplified in *Aguilar*, undermines the very notion of neutrality that is central to a proper understanding of the religion clauses. Groups or individuals with religious affiliations or beliefs are excluded altogether from programs that are intended for the benefit of all citizens or, as in *Aguilar*, they are denied participation on equal terms.

These results only make sense if separation, not neutrality, is seen as the overriding consideration. But separation is not a value in and of itself, and this Court has never gone so far as to suggest that complete separation of church and state is required by the Establishment Clause. Religious freedom is the object of the religion clauses—

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[23] McConnell, *supra* note 21, at 119.

[24] Justice White called the entanglement notion "curious and mystifying," "insolubly paradoxical," "redundant," "superfluous," and without "constitutional foundation." *Roemer*, 426 U.S. at 768-69 (concurring).

freedom to exercise one's own religion and freedom from the establishment of someone else's. Neutrality is a necessary condition of religious freedom, but total separation is not.

Lemon itself recognized that the Establishment Clause "do[es] not call for total separation between church and state; total separation [between church and state] is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." 403 U.S. at 614. Compulsory education laws requiring religious schools to provide education in secular subjects (and requiring the government to monitor that function) are one obvious example of government's connections with religious institutions. There are numerous others. It is a fact of modern life that religious institutions must, of necessity, have contact with the government. In and of itself, that contact tells us nothing about whether the Establishment Clause has been offended.

In fact, the entanglement test does not even ask whether either of the religion clauses has been offended; it asks only whether the government's relationship with a church *might* infringe religious liberty. As this case so amply demonstrates, the test invites the courts to invalidate government action based on speculation, not evidence. It thereby reverses the traditional burden of proof that requires the plaintiff to establish a legal claim.[25] Nowhere else in its constitutional rulings has the Court authorized such an approach.

There is another fundamental "procedural" flaw in the entanglement test: it addresses potential claims that the plaintiffs have no standing to assert. The concern underlying

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[25] *See* Glendon & Yanes, *supra* note 21, at 514; Garvey, *Another Way of Looking at School Aid*, 1985 Sup. Ct. Rev. 61, 86.

the entanglement test is not that supervisory and administrative contacts will *promote* religion in violation of the Establishment Clause, but that they may *inhibit* religion in violation of the Free Exercise Clause. In *Flast v. Cohen*, 392 U.S. 83 (1968), this Court recognized taxpayer standing to assert Establishment Clause claims in a case like this, but it did not recognize general taxpayer standing to assert free exercise claims. "[I]n ruling on standing," the Court explained, "it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. The court then emphasized that when a free-exercise claim is asserted, "the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers within the affected class," *id.* at 104 n.25—namely, those whose free exercise of religion is being inhibited. These plaintiffs are not in the class of citizens whose religious liberty may be inhibited by the so-called "entangling" relationships between the City and the religious schools. They have suffered no "injury in fact" as a result of those relationships. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 485 (1982). They therefore lack standing to complain of the allegedly inhibiting effect of those relationships.

The fear of political divisiveness along religious lines—so-called "political entanglement"—is no more pertinent than administrative entanglement to a proper Establishment Clause inquiry. If the effect of governmental action is to favor or disparage religion, or to coerce participation in a religious exercise, the Establishment Clause is violated. If the effect of government regulation is to interfere with the free exercise of religion, the Free Exercise Clause may be violated. But speculative fear that some will invoke religion to support or oppose a program that does not

itself violate the religion clauses is no basis to conclude that it does. Thus, the Court has "never relied on divisiveness as an independent ground for holding a government practice unconstitutional." *Lynch v. Donnelly*, 465 U.S. at 689 (O'Connor, J., concurring).[26]

In no case since *Aguilar* itself has the Court struck down a program or practice on entanglement grounds, administrative or political. It is apparent that the entanglement prong of *Lemon*, upon which *Aguilar* was based, has lost its vitality. And whatever can be said of the rest of *Lemon*, "excessive entanglement of church and state" should no longer be regarded as an independent ground for striking down a neutral program of secular benefits that is otherwise entirely consistent with the Constitution.

2. *On-site Title I services do not give rise to "excessive entanglement"*

Even assuming that the entanglement prong of *Lemon* retains vitality, the entanglement holding of *Aguilar* should be overruled. *Aguilar* is the most extreme application of the entanglement notion, and it is entirely without logical or factual foundation.

a. Supervision of Title I teachers. The most obvious flaw in *Aguilar's* entanglement reasoning is that the "supervisory

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[26] Indeed, under the Court's own precedents, the fact that there is no direct financial subsidy of the religious school makes the "political divisiveness" argument inapplicable in this setting. Political-divisiveness-type entanglement "must be regarded as confined to cases where *direct financial subsidies* are paid to parochial schools and to teachers in parochial schools." *Mueller v. Allen*, 463 U.S. 338, 403-04 n.11 (1983) (emphasis added). *See also Bowen v. Kendrick*, 487 U.S. 589, 617 n. 14 (1988) (political divisiveness inquiry not relevant outside context of direct religious school funding); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987) (same).

system" that was held to result in "excessive entanglement of church and state" did not involve the *church* at all. Title I teachers are employed by the New York City Board of Education, as are their Title I supervisors. The supervision is thus *of* a public employee *by* a public employee. In short, the relationship is not one of *church and state* at all, but of *state and state*.

In *Lemon* the Court thought that state supervision of *parochial school teachers* excessively entangled church and state. It was more than an extension of that notion—it was a perversion—to suggest that public supervision of *publicly employed* teachers entangles church and state.[27]

Aguilar's analysis of supervision-as-entanglement was flawed from the outset. Again, the contrast with *Lemon* is instructive. In *Lemon*, the Court struck down state programs that paid a portion of the salaries of the regular full-time teachers in church-related schools. The Court noted that "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." 403 U.S. at 618. Entangling "surveillance" was required to guard against "the potential for impermissible fostering of religion . . . present" when state supported teachers operate "under religious discipline." *Id.* at 619.

These concerns are for all practical purposes eliminated when, as in this case, the remedial teachers are employed not by the church-related school, but by a public school board.

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[27] The supervision involved in this case was no more than what in practical effect was mandated by *Abington School District v. Schempp*, 374 U.S. 203 (1963), which held that publicly employed school teachers may not engage in religious activity in public schools. Enforcement of this restriction necessarily requires some form of public supervision of public school teachers, wherever they teach.

Title I teachers are not "under religious discipline." *Id.* They do not report to and are not accountable to religious school officials. They do not teach the regular school curriculum, and it is no part of their job to teach or promote religion in any way. To suggest that these public employees might be induced to teach religion merely because they are temporarily located on the premises of a church related school is far-fetched and demeaning to their professionalism.[28] It is also contrary to the undisputed evidence in the case, which showed that "in 19 years there ha[d] never been a single incident in which a Title I instructor 'subtly or overtly' attempted" to teach religion. *Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting); *see also id.* at 428.

The majority in *Aguilar* ignored the 19-year record and based its fear of religious indoctrination on the broad statement that Title I services are "provided in a pervasively sectarian environment." 473 U.S. at 412. But this Court should "refus[e] to assume that religiosity in parochial elementary and secondary schools necessarily permeates the secular education that they provide." *Tilton v. Richardson*, 403 U.S. 672, 681 (1971) (plurality) (citing *Board of Education v. Allen*, 392 U.S. 236).[29] It should, at the very

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[28] As Justice O'Connor expressed it, "[i]t is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school," especially when "the teacher involved is a professional full-time public school employee who is unaccustomed to bringing religion into the classroom." *Aguilar*, 473 U.S. at 427 (dissenting).

[29] The Catholic schools whose children receive Title I services in New York City do not restrict admission or hiring on religious grounds (many, and in some cases, most of their students are not Catholic); they do not impose religious restrictions on the content of secular instruction; and

least, repudiate that assumption with respect to the secular instruction that publicly employed Title I teachers provide.

In sum, in *Aguilar* the Court substituted speculative fears for the undisputed evidence that Title I teachers were unlikely to, and in fact did not, make any attempt to inject religion into their remedial classes. And then the Court compounded its error by overlooking the fact that the supervision that was employed to guard against that unlikely event was of a *state* employee by another *state* employee.[30] Even if entanglement of church and state is an independent basis for evaluating government action, it is not present in the state-to-state supervisory relationships under Title I.[31]

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they do not make any effort to compel their students to adopt or obey the teachings of Catholicism. JA 71-72, 659-60, 666-81, 684-85, 691-708.

[30] The only element of supervision of the school that was mentioned was that Title I supervisors might have to determine what is and what is not a "religious symbol" that would have to be removed from a Title I classroom. *Aguilar*, 473 U.S. at 413. But that is a red herring. The record revealed no disagreement over what was a religious symbol and no hesitation whatsoever on the school's part in removing such symbols.

[31] The decision in *Aguilar* was based explicitly on *Meek*, which struck down a program of auxiliary services that resembled Title I in certain respects. But the context of *Meek* was quite different. The program had had just been enacted by the Commonwealth of Pennsylvania after *Lemon* had invalidated its program of subsidizing parochial school teachers. The program came to the Court, therefore, without a factual record of the kind that was present in *Aguilar*. In *Meek*, the Court recognized that the "potential for impermissible fostering of religion" that was central to *Lemon* was "somewhat reduced" by the fact that auxiliary service teachers were not employed by the schools and "not directly subject to the discipline of a religious authority." 421 U.S. at 371-72. But in the absence of any experience under the program, the Court was unpersuaded that the "potential" had been eliminated. The Court did not explain how the supervision of a public employee by another public employee could constitute entanglement of church and state, however, and *Aguilar*

b. Routine administrative contacts. Nor is there excessive entanglement in the ordinary and routine administrative contacts that do exist between Title I and school officials. As the Court noted in *Aguilar*, administrative personnel work together on scheduling, classroom assignments and requests for services. Teachers discuss "individual student needs, problems encountered, and results achieved." 473 U.S. at 413 (quotation omitted). But these routine contacts present no risk that the City will stifle religion in the schools' regular classes, nor do they present any other imaginable risk pertaining to an establishment of religion. Indeed, if these elements of cooperation are impermissible under the Establishment Clause, then parochial school students would be ineligible to participate in Title I instruction at any location. Wherever Title I services are offered to these children, there must be coordination with the administrators and teachers in their regular schools. And the coordination is not materially different simply because the instruction is offered on-site.[32]

c. Political divisiveness. Nor, finally, is there any reason to prohibit on-site Title I instruction on grounds of "political

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appears to have adopted that notion without reexamination, notwithstanding this observation of the Court in *Wolman*, 433 U.S. at 248: "It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state."

[32] Generally applicable administrative regulations such as the coordination requirements here do not offend the Establishment Clause when imposed on religious organizations. *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 395 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 696-697 (1989); *see also Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (upholding *reimbursement* for "ministerial" and "nonideological" recordkeeping, which cannot be used to foster an ideological outlook).

entanglement." The *Aguilar* majority wrote that "[t]he numerous judgments that must be made by agents of the city concern matters that . . . *may be* of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase." 473 U.S. at 414 (emphasis added). Notably, however, the Court did not identify any judgments that *are* of "deep religious significance," much less any evidence of "divisiveness along religious lines."[33]

Petitioners would agree that if City officials were to impose their judgments on matters "of deep religious significance," a free exercise issue would arise. But no one has identified such an incident. Certainly the church-related schools, which would have standing to object to such an intrusion, have not raised any complaint. The fact is that there is no evidence whatsoever of governmental intrusion in the religious affairs of the schools and "little record support for the proposition that New York City's admirable Title I program has ignited any controversy other than this litigation." *Aguilar*, 473 U.S. at 428 (O'Connor, J., dissenting).

d. Conclusion. Even assuming that excessive entanglement" of church and state is an independent basis for assessing Establishment Clause violations, there is no such "excessive entanglement" in an on-premises Title I program. Supervision of public employees by other public employees, routine administrative contacts with religious school officials, and speculative fears of political divisiveness do not in any

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[33] Just two years before *Aguilar*, the Court had said: "At this point in the 20th century . . . [t]he risk of . . . deep political division along religious lines . . . is remote . . . ." *Mueller*, 463 U.S. at 400 (quotation omitted).

meaningful sense constitute "entanglement between church and state," much less "excessive entanglement." And they provide no basis whatsoever for invalidating a religiously neutral program of secular benefits that neither funds, endorses nor coerces religious activity. *Aguilar* relied exclusively upon these considerations to conclude that Title I services may not be offered to needy children in church-related schools in the same convenient and effective setting in which services are offered to students in public schools. That result did not protect, but offended, the principles of religious freedom, tolerance and neutrality that underlie the First Amendment's religion clauses. *Aguilar*, therefore, should be overruled.

II. RULE 60(b) IS A PROPER VEHICLE FOR SECURING RELIEF FROM THE JUDGMENT

For over a decade, the parties to this case have been operating under a continuing injunction that prohibits the government defendants from furnishing Title I services to the children of the intervenor-defendants (these petitioners) on the premises of their regular schools. Significant factual and legal developments during that period have led the petitioners to seek relief from the continuing injunction.

First, as a factual matter, the costs of compliance with the injunction have had a devastating effect upon the Title I program in New York. Not only have parochial school children been forced to accept arrangements that are educationally inferior to on-site instruction, but thousands of other needy children in public and private schools alike are being deprived of Title I services altogether. The reason is simple: the post-*Aguilar* Title I delivery methods are vastly more expensive than the on-premises method that they replaced. Well over $100 million has been spent *in New York City alone* to cover the additional cost of providing Title I services through these alternative means, and that

figure increases by $15 million every year. JA 333-37, 345. Comparable costs have been incurred in connection with the provision of Title I services in other school districts throughout the country.[34]

In short, money that could be used to increase the number of children who receive services under Title I is being spent instead to cover the extra costs of providing educationally inferior services to a smaller number of children. The effect in New York City alone is dramatic. In the 1995-96 school year, as many as 5600 additional educationally needy children might have received Title I services—in both public and private schools—through funds that were spent instead to cover the additional administrative costs of complying with *Aguilar*.[35]

This Court has stated that "the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Wolman v. Walter*, 433

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[34] *See, e.g., Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1463 (9th Cir. 1995); *Pulido v. Cavazos*, 934 F.2d 912, 925 (8th Cir. 1991).

[35] *See* Pet. App. 18a. It is not only parochial school students, but also public school students, who are affected. To comply with the statutory mandate that educational services be provided equitably to both public and private school students, the Secretary of Education has ordered that the administrative costs of the alternative delivery systems be taken "off the top" of a school district's Title I allocation. JA 335; 34 C.F.R. § 200.52(a)(2)(1994). In other words, local educational agencies must subtract administrative costs of complying with *Aguilar* "off the top" of their total allocation for all eligible students, before dividing remaining funds pro rata between eligible public and private school students. The result is that fewer Title I dollars are available for actual instruction to public and private school students alike.

U.S. 229, 247 n.14 (1977). But *Aguilar* has had precisely that effect.

Second, as discussed, the decision in *Aguilar* has been seriously undermined by subsequent developments in this Court's Establishment Clause jurisprudence. The entanglement prong of *Lemon*, upon which *Aguilar* was based, has fallen into desuetude and been explicitly criticized in the opinion of the Court in *Bowen*. 487 U.S. at 615. Decisions such as *Witters*, *Zobrest* and *Rosenberger*, which upheld the provision of secular benefits on a religiously neutral basis, appear to foreclose any other rationale for *Aguilar*. So powerful are the indications that *Aguilar* no longer reflects the prevailing interpretation of the Establishment Clause that a majority of the Members of this Court have expressly called for its explicit overruling or reconsideration.[36]

If reconsideration of *Aguilar* is warranted, then surely the parties who are subject to the continuing injunction in the case are appropriate parties to seek it. Reconsideration is awaiting "a proper case." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J.). As the district court observed, "there could scarcely be a more appropriate [case] . . . than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision." Pet. App. 10a. And Rule 60(b), which authorizes relief from a judgment when "it is no longer equitable that the judgment should have prospective application" or for "any other reason justifying relief," is the

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[36] *See, e.g., Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring in part and concurring in the judgment), 731 (Kennedy, J., concurring in the judgment), 750 (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., dissenting).

the proper procedural vehicle for the petitioners' requests. Fed. R. Civ. P. 60(b) (5), (6).

A. Federal Courts Have Power To Grant Relief from a Continuing Injunction.

Federal courts have all the powers of a traditional court of equity to entertain motions addressed to their own injunctions. As Justice Cardozo expressed it:

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions . . . . [Even if power to modify were not spelled out in terms], power there still would be by force of principles inherent in the jurisdiction of the chancery.

United States v. Swift & Co., 286 U.S. 106, 114 (1932). As this Court has explained, "a sound judicial discretion may call for the modification of the terms of an injunction decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *System Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961).

Rule 60(b) is not the source of the courts' power to grant relief from an injunction; the rule merely provides a vehicle for its exercise. "Rule 60(b) . . . reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1460 (1995) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)).[37] This power is plenary in the absence of a clear limitation upon it. "Unless otherwise provided by statute, all the inherent

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[37] Thus, "Rule 60(b) . . . is simply the recitation of pre-existing judicial power." *Plaut*, 115 S. Ct. at 1461.

equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).[38]

In sum, there can be no doubt that the federal courts have power to modify or vacate their injunctions, and that Rule 60(b) is the appropriate procedural vehicle for seeking such relief.

B. That the Case Was Decided by This Court Does Not Deprive the District Court of Its Power to Entertain a Rule 60(b) Motion

That an injunction is approved or directed by an appellate court, even by this Court, does not deprive the district court of the power, or jurisdiction, to entertain a request to vacate or modify it. The Court so held in *Standard Oil Co. v. United States*, 429 U.S. 17 (1976). In that case, petitioners filed a motion in the Supreme Court three years after the Court had affirmed an injunction, asking the Court to recall its mandate and grant leave to file a Rule 60(b) motion in the district court. In the past, the Court had held that appellate leave was required to reopen a case that had been decided on appeal. But the Court explicitly abandoned that requirement in *Standard Oil*, holding that "the District Court may

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[38] The Court elaborated:

> Comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Porter, 328 U.S. at 398 (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)).

entertain a Rule 60(b) motion without leave by this Court." *Id.*

In *Standard Oil*, the Court addressed both of the concerns that have been advanced by the respondents in this case—that allowing Rule 60(b) motions in the district court in cases decided by the Supreme Court would compromise the interest in finality and open the floodgates to frivolous Rule 60(b) applications. "[T]he interest in finality," the Court explained, "is no more impaired in this situation than in any Rule 60(b) proceeding." *Id.* at 19. And, the Court added, it had "confidence in the ability of the district courts to recognize frivolous Rule 60(b) motions." *Id.*

It is thus well established that "even after judgment is entered on the mandate . . . the district court has the power to consider a motion under Rule 60(b) for relief from judgment." 1B J.W. Moore, et al, Moore's Federal Practice, ¶ 0.404[10] at II-61 (1995) (discussing law-of-the-case). That is true whether the motion is based on a change in the facts or a change in the law. As the Seventh Circuit has concluded, "where a change in law is an event arising after the appellate court mandate, . . . under the principles of *Standard Oil*, we believe a district court has jurisdiction to address [it]." *LSLJ Partnership v. Frito-Lay, Inc.*, 920 F.2d 476, 478 (7th Cir. 1990).

Under *Standard Oil*, the petitioners acted properly in directing their Rule 60(b) motions directly to the district court without seeking appellate leave, and the district court was correct in determining that the motions were properly directed to it.

C. There Was No Alternative to a Rule 60(b) Motion

A motion under Rule 60(b) is not only a *proper* vehicle for seeking relief from the judgment, as *Standard Oil* makes

clear; it is the *only* available vehicle. Petitioners cannot proceed through a separate action for a declaratory judgment. Absent a modification of the judgment in this case, the principle of *res judicata* would bar a separate suit between the same parties. Indeed, a declaratory judgment action would face an additional obstacle: the absence of a defendant to give the case the adverseness necessary to create a case. All of the parties who have any involvement in New York City's Title I program—the city, state and federal governments and the parent-intervenors—agree that *Aguilar* should be overruled. That leaves the taxpayer plaintiffs as the only potential defendants. And although this Court's decisions give those taxpayers standing to bring an Establishment Clause challenge, the law does not permit petitioners to make them defendants in a declaratory judgment action.

Nor is there any way for these parties, or any others, to seek *Aguilar's* overruling in any other case that has arisen in its aftermath. There have been a series of lawsuits filed across the country in which plaintiffs have attempted to extend *Aguilar* by arguing that the Establishment Clause prohibits the alternative arrangements that have been implemented in its wake. These challenges have been rejected by the United States Courts of Appeals for the Sixth, Seventh, Eighth and Ninth Circuits, and by the same district court that decided these 60(b) motions.[39] *Yet in none of these cases have pro-Aguilar plaintiffs petitioned for certiorari in this Court.* The clear signals of *Aguilar's* impending demise have produced a situation in which cases

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[39] *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Board of Ed. v. Alexander*, 983 F.2d 745 (7th Cir. 1992); *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991); *Committee for Public Ed. and Religious Liberty v. Secretary*, 942 F. Supp. 842 (E.D.N.Y. 1996).

that might present an opportunity to overrule *Aguilar* are being strategically withheld from the Court's consideration.

In the district court, respondents suggested that the only available mechanism for challenging *Aguilar* would be for the Board of Education to implement on-premises instruction in violation of the injunction, and defend against the ensuing contempt charge on the ground that *Aguilar* was no longer good law. The district court properly dismissed that suggestion.[40] This Court has said that "outstanding injunctive orders of courts [must] be obeyed until modified or reversed by a court having the authority to do so." *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439 (1976). This principle—the collateral bar rule—buttresses the case for consideration under Rule 60(b):

> There is necessarily a counterpart to this well-established insistence that those who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonable and proper objections to that order, until it is modified or reversed. The counterpart is that *when such persons heed this well-established rule and prosecute their remedy first by a motion to modify in the issuing court and then, failing there, by appeal of that court's denial of their motion, they are entitled in a proper case to obtain a definitive disposition of their objections.*

Id. at 440 (emphasis added). Having followed the prescribed procedure, petitioners are entitled to a "definitive disposition of their objections" in this case. *Id.*

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[40] "[A]s a procedural device, [the Rule 60(b) motion] is far preferable to contemptuously defying the injunction by placing teachers back in the parochial schools, the course that, according to counsel for the plaintiffs at oral argument, is the only proper means of obtaining appellate review of the continuing validity of the injunction." Pet. App. 9a-10a.

D. There Are Adequate Grounds for Relief from the Judgment

Rule 60(b), which provides the vehicle for the exercise of the court's inherent power to modify its injunctions, also outlines the accepted grounds for the exercise of that power.[41] Of particular relevance here, Rule 60(b) recognizes that relief may be granted if "(5) . . . it is no longer equitable that the judgment should have prospective application; or (6) [for] any other reason justifying relief from the operation of the judgment."

The enormous costs of compliance with *Aguilar*, and the disruptive effect it has had on a major governmental program, make it "no longer equitable that the judgment should have prospective application." Rule 60(b)(5). The intervening developments in the governing Establishment Clause principles reinforce that conclusion and provide "other reason[s]" as well for relief under Rule 60(b)(6). That provision "grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just'. . . . [I]t provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)).[42] It is well-established that "intervening and supervening edicts of the Supreme Court . . . qualify under

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[41] "Rule 60(b) does not assume to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief." Advisory Committee on Rules—1946 Amendment: Note to Subdivision (b).

[42] *See also Klapprott*, 335 U.S. at 614 (rejecting claim that "other reason" clause of Rule 60(b)(6) is limited only to grounds available under pre-Federal Rules writs).

the Rule as a 'reason justifying relief from the operation of the judgment.'" *Griffin v. State Board of Education*, 296 F. Supp. 1178, 1182 (E.D. Va. 1969).

The district court and the court of appeals agreed that the petitioners had "properly proceeded under Rule 60(b)," and therefore considered their arguments on the merits. Pet. App. 9a; *see also id.* 13a. The courts below also agreed that there had been significant changes in the law: "In the years since the Supreme Court's *Aguilar* decision, the landscape of Establishment Clause decisions has changed." Pet. App. 4a. "[I]t is at least unusual, if not extraordinary," the district court observed, "that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now." Pet. App. 7a-8a.

The district court and the court of appeals were understandably unwilling to grant the requested relief in the absence of an explicit overruling of *Aguilar* by this Court. But this Court need not hesitate to do what the lower courts concluded that *only* this Court can do.[43]

"Law of the case" does not stand in the way of this Court's overruling *Aguilar* at this stage of this case, any more than *stare decisis* would stand in the way of the

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[43] District courts have on occasion decided not to follow Supreme Court precedent when they thought intervening events had deprived the precedent of continuing force. *See, e.g., Browder v. Gayle*, 142 F. Supp. 707, 715-17 (M.D. Ala.) (refusing to follow *Plessy v. Ferguson*, 163 U.S. 537 (1896)), *aff'd*, 352 U.S. 903 (1956); *Barnette v. West Virginia State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D.W. Va. 1942) (refusing to follow *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1939)), *aff'd*, 319 U.S. 624 (1943). More commonly, when a precedent of this Court has not been overruled explicitly, a district court will follow that precedent no matter how precarious its footing. It then falls to this Court to decide whether to accept the issue for review and overrule its precedent.

Court's overruling *Aguilar* in another case. Neither *stare decisis* nor law of the case is an absolute principle; both must necessarily accommodate intervening decisions and doctrinal developments that cast doubt on the earlier decision.

"Law of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618 (1983). It is "not an inviolate rule," but "merely expresses the general practice of refusing to reopen what has been decided." *United States v. Melendez-Carrion*, 820 F.2d 56, 60 n.1 (2d Cir. 1987).[44] And one of the "major grounds justifying reconsideration [is] an intervening change of controlling law." *DiLaura v. Power Authority*, 982 F.2d 73, 76 (2d Cir. 1992) (quotations and citations omitted).

Since *Aguilar* was decided twelve years ago, there have been significant developments in the law that have not only undermined the rationale of that decision, but also foreclosed any other basis for its result. The entanglement test on which *Aguilar* was based has been criticized by the full Court and all but abandoned. Intervening decisions such as *Rosenberger*, *Zobrest* and *Witters* support the provision of on-site Title I services on a religion-neutral basis. If these developments were not sufficiently clear to enable the courts below to grant the relief that has been requested, they are surely strong enough indications of a change to warrant a clear statement by this Court as to whether *Aguilar* any longer reflects the current understanding of the Establishment Clause.

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[44] Likewise, *stare decisis* is "a useful rule, but not an inexorable command." *Erie R.R. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring).

CONCLUSION

For the foregoing reasons, *Aguilar* should be overruled. The judgment of the court of appeals should be reversed, and the case remanded with instructions to vacate the injunction.

Respectfully submitted,

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Nos. 96-552 and 553

In The

Supreme Court of the United States

October Term, 1996

RACHEL AGOSTINI, *et al.*,

Petitioners,

-and-

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et ano.*,

Petitioners,

vs.

BETTY-LOUISE FELTON, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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COUNTERSTATEMENT OF THE FACTS

1. Introduction

In this counterstatement, Respondents will not attempt to describe the Title I statute, for two reasons. First and foremost, Respondents have not, from the commencement of this case in 1978, challenged the statute. Rather, they have challenged the actual plan or program the Chancellor placed in operation in "nonpublic" schools in New York City, beginning in or about 1965, purportedly under the statute ("Program"), and they have challenged the statute only to the extent it might be construed to authorize that Program (JA 9-13). Second, Petitioners' description of the statute in their briefs is adequate.

This counterstatement, however, is made necessary because Petitioners' statement of the Program is woefully inadequate and misleading in critical respects.

2. The "Nonpublic" Schools in the Program.

There does not appear to be any statement in the documents submitted by the original defendants in this case concerning the percentage of "nonpublic" school students receiving instruction and guidance in the Program who attended parochial schools. In any event, the percentage of such students in the current New York City Title I program (off the premises of such schools) is more instructive if, as Petitioners propose, the Program is to be reinstituted. According to Petitioner The Board of Education of the City School District of the City of New York ("Board of Education"), *the percentage of "nonpublic" school students in the current program who attend parochial schools is no less than 99.52.* (Decl. of Margaret O. Weiss, dtd. 6/9/95, pp. 469-70, paragraph 13 [annexed to memorandum of Agostini Petitioners in support of their Rule 60(b) motion and referred to at JA 300]).

The Program under consideration in this case, therefore, is by no means one that would serve "a broad class of citizens defined without reference to religion." (Agostini Br., p. 16). It would serve students attending parochial schools only when their schools elect to participate in the Program.

Continuing at this point with the most current statistics available through the school year 1993-94, approximately 86% of the "nonpublic" school students in the current New York City Title I program attended Roman Catholic schools, and 8% attended Hebrew Day schools. (JA 341).

In this connection, it is noteworthy that as recently as 1993, one of the highest officials of the Roman Catholic Church in New York City reiterated the Church's position that "[t]he primary mission of the parochial school remains the teaching of religion," and without that mission, developed and published in a "mission statement," a Catholic parochial school "has no reason for its existence." (Aff. of Stanley Geller, dtd. 12/26/95 in opposition to the Rule 60(b) motions, referred to at JA 299.) There is no documentation in the record of this case concerning the sectarian nature of the Hebrew Day schools, but the nature of those schools that are operated by Hasidic sects can be gleaned from the description of the sizeable Satmar sect in *Board of Education of Kiryas Joel School District v. Grumet*, 114 S. Ct. 2481, 2485 (1994). In any event, there is no claim in this proceeding that either the Roman Catholic schools or the Hebrew Day schools in New York City are not "pervasively" sectarian.

Under the Program since its inception until 1985,[1] Catholic parochial school teachers were not required to be Catholic, but

---

1. One of the defects in this unique proceeding, purportedly under Rule 60(b), is that there has been no opportunity in the proceeding to develop facts relevant to the grave constitutional question now under consideration. This forces Respondents to shuttle between current dates and pre-1989 dates.

they were required, as a condition of hiring, to agree "to cooperate with the policies of the school, the religious education program, value education and the general Catholic atmosphere of respect for each other, for learning and for God." (JA 263.)

Even in the secular courses in those Catholic parochial schools, the teachers were "encouraged to expose students to the moral and value dimension of the subject matter within a Christian framework." (JA 265.)

3. The Program in Operation.

Under the Program, the benefits of Title I were clearly extended to parochial school students only through their schools. First, students who were eligible were unable to participate if the total number of eligible students in their school was too small to make it practical for the Board of Education to assign even one teacher or guidance counselor to their school. (JA 43.) Second, even if the total number of eligible students in a parochial school was large enough, their participation required the school's principal to arrange for the services to be provided at the school. (JA 60-61.) No student or parent could make any such arrangement. (*Id.*) Third, because of a lack of funds, although the eligibility of each student attending a parochial school was established objectively, the selection of a student for actual participation in the Program was in major part determined by the teachers and principal of the school. (JA 237-50.)

4. The Public School Teachers and Counselors.

Although hired, paid and, theoretically, under the complete control of the Board of Education, public school teachers and counselors providing services in the Program were assigned to parochial schools on a purely voluntary basis, a procedure that

was deemed to ensure that they would be comfortable performing services in a parochial school. (JA 48.)

Additionally, those public school teachers and counselors were selected without reference to their religious preference, and without any screening application questions to that effect. (JA 49.) Thus, a substantial number of the teachers who volunteered who were Catholic were undoubtedly assigned to Catholic parochial schools, and a substantial number who were Jewish were assigned to Hebrew Day schools.

In the motions for summary judgment in this case in 1982, the Chancellor stressed the alleged fact that the public school teachers and counselors in the Program were "itinerant" because allegedly 78 percent spent "less than five days a week" at any one parochial school. *Felton v. Secretary, U.S. Dep't of Educ.*, 739 F.2d 48, 66 (2d Cir. 1984). As Judge Friendly noted, however, that meant that a substantial number, 22 percent, spent a full week at one parochial school, and thus were hardly "itinerant." (*Id.*) The Chancellor also argued that the students at 180 of the 231 participating parochial schools allegedly received Title I services from "itinerant" teachers and counselors. (*Id.*) But as Judge Friendly pointed out, that meant that the students at no less than 51 parochial schools received services from public school teachers and counselors who performed their services at those schools as regularly as their parochial school counterparts. (*Id.*)

Under the Program, although the public school teachers and counselors assigned to parochial schools were instructed that they were solely accountable to, and subject to the supervision of, the Board of Education, and that they, the teachers and counselors, were solely or ultimately responsible for virtually all aspects of the Program as actually administered in the parochial schools, they spent far less time with their supervisors

than with their parochial school counterparts and principals, and they appeared to give far less attention to their instructions than to the advice and recommendations of the parochial school personnel. (JA 237-250.)

Thus, the public school teachers conferred regularly with the parochial school teachers and principals concerning all aspects of the Program. (*Id.*) They decided with the parochial school teachers, and to a lesser extent with the parochial school principals, which parochial school students eligible to receive their services would actually receive them. (JA 239, 240, 242, 244.) They accepted referrals to the clinical and guidance services of the Program made by the parochial school teachers and principals. (JA 237, 239, 245, 248, 249.) At times, they requested those services jointly with their parochial school counterparts. (JA 245.)

To quote the OEE Evaluation Reports issued by the Board of Education, the public school teachers assigned to parochial schools participating in the Program, "find out what the classroom [parochial school] teachers are teaching and/or coordinate lessons." (JA 240.) They conferred with the parochial school teachers to ascertain the specific weaknesses of students in their regular classroom studies in order to help the students in those studies. (JA 23.) And they also helped directly with regular classroom studies. (JA 237.)

The public school clinical and guidance counselors assigned to parochial schools worked with the parochial school teachers "in formulating comprehensive treatment plans." (JA 249). They used a "team approach." (JA 250.)

In short, in the Program's actual operation, the public school teachers and counselors assigned to parochial schools were as much a part of the faculty of those schools as the parochial school

staff. They worked together in a manner that made it virtually impossible to determine — if anyone sought to determine — who was actually, as opposed to theoretically, responsible for virtually any decision. Additionally, and no less significantly, the public school teachers and counselors removed a huge burden from the shoulders of the regular classroom teachers by taking over the task of raising to grade level — in the critical subjects of reading, mathematics and learning English as a second language — those students who were below grade level. This enabled the classroom teacher to proceed with the instruction of the rest of his/her class in a manner and at a pace that would otherwise have been impossible.

5. The Supervision of Public School Personnel.

Under the Program, one Board of Education field supervisor was "ordinarily" responsible for supervising the work of 22 public school teachers assigned to parochial schools. (JA 53.) The supervisor, therefore, could do little more than "attempt" to make "at least one unannounced visit to each teacher each month." (*Id.*) The primary purpose of such visits, moreover, was to evaluate the teacher's performance from an educational viewpoint. (*Id.*)

With respect to the "unannounced" nature of those monthly visits, it is noteworthy that a class under the Program as administered in a "Title I classroom" (inside the parochial school), consisted of *ten or fewer* students in addition to the teacher. (JA 51.) Clearly, therefore, although the supervisor may have been "unannounced" before he walked through the door of the classroom, he was hardly so thereafter if, among other things, he was checking to see if the teacher was engaging in any conduct offensive to the Establishment Clause.

Assuming, moreover, that the occasional visits of a

supervisor were a form of surveillance calculated to uncover such conduct, there is not an iota of evidence in this case of any surveillance of any public school teacher or counselor outside of an actual class, such as when they were in conference with a parochial school teacher or principal. There is also no evidence of any form of interrogation of any public school teacher or counselor assigned to a parochial school or of any student, teacher or principal of a parochial school or any parent of any such student concerning any conduct offensive to the Establishment Clause. (And one can imagine what a "brouhaha" there would have been if any such interrogation of parochial school personnel had ever been attempted.)

There is not the slightest reference in any of the OEE Evaluation Reports to any matter relating to conduct offensive to the Establishment Clause. (JA 237-250.)

It is a matter of small wonder, therefore, that in 1982, the Corporation Counsel of the City of New York could state, in good conscience, on behalf of his client, the Chancellor, that there was no "known" instance of any public school teacher or guidance counselor assigned to a parochial school engaging in any conduct offensive to the Establishment Clause. There was no system in effect that was calculated to bring any such conduct to the attention of the Chancellor or the Board of Education.

6. The Post-*Aguilar* Plan or Program.

After *Aguilar,* the Chancellor, together with the Board of Education, was given one year by the District Court to develop an alternative plan to the now-prohibited Program. (Order of District Judge Neaher, filed 9/26/85, to which reference is made at JA 299.)

In the initial plan proposed by the Chancellor for the school

year 1986-87, 80% of the parochial schools that had participated in the (pre-*Aguilar)* Program were offered space in "matching" public schools in which their eligible students might receive Title I services. (JA 516.) Each "matching" school was no more than 10 minutes away from the parochial school with which it was paired. (JA 522.) The City proponents of the plan considered it to be "as educationally beneficial and cost effective as possible within the constraints imposed by the *Aguilar* decision." (JA 515.) Suffice it to say in this proceeding that the offer of "matching" public schools was rejected out of hand by the principals of the parochial schools to which it was made (JA 528). Specifically, the offer was rejected by 142 of the 194 principals to whom it was made. (JA 711.)

As a result of this action by the parochial school principals, whether justified or not, the number of parochial school students who received Title I services in the school year 1986-87 was 50 percent lower than had received such services in the school year 1985-86, the last year under the (pre-*Aguilar)* Program. (JA 712.) Clearly, the parochial schools authorities exercised a veto power over whether their students received Title I services.

The post-*Aguilar* plan or Program ultimately developed and presently in operation in New York City with respect to parochial schools ("Post-*Aguilar* Program") has four components. The most important of these, and the most expensive, entails the use of mobile instructional units ("MIUs"), buses fitted out as classrooms and driven to, or in the immediate vicinity of, the participating parochial schools (JA 319-323.) Each MIU, and in the school year 1994-95 there were 126 of them, costs $106,934 per year to rent. (JA 323, 338.)

The other three components of the Post-*Aguilar* Plan — an ever decreasing number of public school classrooms, a few

allegedly "neutral" leased locations, and a computer-assisted program — are of far less significance and far less costly than the MIUs, and they are adequately described for present purposes in the papers submitted by the Chancellor and the Board of Education in the District Court (JA 316-319, 323-329, 336).

7. The Alleged Administrative and Financial Burdens of the Post-*Aguilar* Program.

Petitioners and the Secretary complain of the alleged administrative and financial burdens of the Post-*Aguilar* Program (Chancellor's Br., p. 16; Agostini Br., p. 10; Secretary's Br., pp. 37-38). Below, Respondents will argue the legal merits, or demerits, of their complaints. Here, suffice it to say, these complaints are extremely tardy and woefully exaggerated.

With respect to the alleged administrative burden, it bears repeating that the chief component of the Post-*Aguilar* Plan are the MIUs. The bleak scene portrayed in the Secretary's brief of a "teacher leading the children out into the cloudy ten-degree day and across 100 yards of an ice-covered parking lot to return to their school" (Br., p. 38) from some "van" or "portable classroom" that is "cramped and noisy" (Br., p. 37) bears no resemblance to any scene in New York City under the Post-*Aguilar* Program.

First, as noted, the MIUs used in the Post-*Aguilar* Program are parked at the door of the parochial school to which they are dispatched unless the door has a fire hydrant at the curb or faces a one-way street, in which event they may be parked a few feet away from the door or across the street. (Weiss Decl. of 6/9/95, *supra*, pp. 29-30.) Second, the MIUs in the Post-*Aguilar* Program are not "cramped" or "noisy" for students, and neither the Chancellor nor the Board of Education has described them as

such. (JA 320-323; *see also*, the originals of photographs of the MIUs attached to the Weiss Declaration of 10/16/95, of which copies appear at JA 465-467.) They may lack bathroom facilities for a student who might possibly need such facilities during class (Chancellor's Br., p. 14), but so does every classroom in a parochial school building, and the walk from an MIU parked at the door, or in the immediate vicinity, of a parochial school to a bathroom in that building is not likely to be farther than a walk from a classroom to a bathroom in the building.

Third, and most important, it is more than questionable that the time taken for a student in a parochial school to attend or return from class in an MIU would be more than the 10 minutes consumed in a normal recess between classes. All of the foregoing applies to the public school teachers and counselors and their parochial school counterpart who might wish to confer within an MIU. If a parochial school teacher is discouraged from participating in a conference in an MIU parked just outside the school door, he/she ought to be replaced as fast as the principal can find time to effect the replacement.

The alleged financial burdens are also exaggerated. Here is what the Chancellor and Board stated concerning them elsewhere:

> Nevertheless, even under a statistical analysis, *the New York City Board's expenditures for post-Aguilar delivery methods have been far from 'excessive' or 'disproportionate'* .... This is especially clear when those expenditures are compared to the Board's total [Title] I expenditures, as they must be. . . . *For example, in the school year 1987-88, the Board spent a total of $197,657,498 under [Title I] (including*

> *federal and state capital expenses). . . . In the same year, the Board spent $7,917,102 for the noninstructional costs of post-Aguilar methods — approximately 4% of the total.*

Gov't. Defts. Memo. in Support of Motion for Summary Judgment, pp. 60-61, *Committee for Public Education v. Secretary, U.S. Dep't. of Educ.*, 88 Civ. 96 (JG) (E.D.N.Y. 1996) (emphasis added).

Additionally, both the alleged administrative and financial burdens of the Post-*Aguilar* Program have been apparent since at least 1984 when Petitioners' predecessors in this case sought to use them to convince the Court of Appeals for the Second Circuit not to rule the (pre-*Aguilar*) Program unconstitutional. (730 F.2d 48, 71; *see also*, the charts reflecting post-*Aguilar* expenditures since the school year 1986-87, submitted by the Chancellor and Board of Education more recently in their Rule 60(b) motion in the District Court [JA 344-346].)

SUMMARY OF ARGUMENT

I.

Rule 60(b) is not a proper vehicle for Petitioners to seek or obtain a rehearing of a case decided by this Court twelve years ago. Such an unprecedented use of the Rule is particularly inappropriate where, as here, the sole basis for the motion is that recent dicta by Justices in an unrelated case amounted to a "significant change in the law" warranting relief from a prior judgment.

The dicta relied upon by Petitioners in the dissenting and concurring opinions in *Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481 (1994) although critical of *Aguilar*,

could not and did not have the effect of overruling that precedent. Not only does dictum lack binding legal authority, it is an unreliable predictor of how the Court, or even an individual Justice, will ultimately decide an issue when fully briefed and presented for review.

Petitioners cannot justify their Rule 60(b) motions by relying on "changed factual conditions" when the alleged changed facts were apparent to them before, and known to them shortly after, *Aguilar* was decided. Nor can Petitioners rely upon intervening changes in decisional law as a basis for their motions where it is undisputed that *Aguilar* remains the controlling authority in this case. Petitioners' reliance on generalized statements about the broad equity powers of the federal courts is also unavailing. Rule 60(b) is not a source of judicial power and cannot enlarge or modify any substantive rights. Petitioners can point to nothing in the language of the Rule, its historical precedents, or its interpretive case law to support their contention that relief from a final judgment may be based on an *anticipated* change in the law. Rule 60(b) was designed to ameliorate procedural infirmities and inequities where there has been an actual change in the law, not to effect such a change.

Petitioners' proposed use of Rule 60(b) threatens to increase the burdens on federal courts. It will encourage litigants to make motions that district courts and courts of appeals are powerless to grant in order to obtain what is in effect an original hearing in this Court. This runs directly counter to the efforts of Congress and the Court to limit the Court's jurisdiction and case load, and possibly the Constitution's limitations on the Court's power. This novel use of Rule 60(b) will also invite tenacious litigants and enterprising counsel to seek reconsideration of final judgments based on little more than speculation that a change in the Court's membership, or even a perceived change in one Justice's view, might increase their chances of a better result the second time around.

The Court's institutional integrity will be compromised if the views expressed by individual Justices are accepted as bases for Rule 60(b) motions. The legitimacy of the Court derives from its steadfast adherence to the rule of law and its refusal to allow constitutional doctrine to vacillate with changes in the Court's membership. If the Court permits precedent to be reopened on the basis of prognostication and head-counting, it will feed the perception that the Court is no different from any political body.

II.

In addressing the question whether the Court should overrule *Aguilar,* Petitioners abuse the concept of "neutrality" as if the mere repetition of the word will solve virtually any question relating to the Establishment Clause. After doing so, Petitioners, particularly the Agostini Petitioners, are forced to acknowledge that there are substantial questions in this case that require more than a general reference to the concept of "neutrality."

Petitioners try to fit the Program in this case, in which public funds were used to have public school teachers and guidance counselors provide remedial instruction and counseling to students attending parochial schools inside those schools, into the category of one in which government benefits were made available generally to a broad class of citizens defined without reference to religion. They do so, by reference to the broad, general wording of the statute, known as "Title I," under which the program was purportedly developed and placed in operation.

Respondents, however, have not from the beginning of this case challenged the statute facially. Rather, we opposed the New York City actual plan or program ("Program") as it was in operation prior to 1985, and we now oppose its re-institution. We deny that the Program falls into the category suggested by

Petitioners. Rather, we say that it falls into the category of programs in which public funds have been used to subsidize the religious function or mission of parochial schools by relieving them of the burden of providing instruction in basic secular subjects.

Respondents submit further that the Program falls into the category of one that creates a symbolic union of government and religion or religious schools and thereby conveys to the students of the participating parochial schools and the general public a message of government endorsement of religion and, more particularly, the religious mission of the parochial schools.

Respondents submit lastly that the Program is one that presents the danger that public school teachers and guidance counselors performing services inside parochial schools, regularly, and virtually as members of the faculty or staff of those schools are likely to engage in conduct offensive to the Establishment, deliberately, ignorantly or inadvertently, and that, because it is a danger that cannot be prevented by any system of surveillance that would be feasible, it can only be prevented by the prophylactic measure of prohibiting, or continuing to prohibit, any program that would place public teachers or counselors in that position.

Respondents eschew reference to, or support of, any "prong" of the three-prong test first announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Rather, we will rely on cases accepted as precedents by the Court and involving facts close to those in the present case, such as *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), the companion case to *Aguilar*.

We believe we will be able to demonstrate that the few cases on which Petitioners are forced to rely are inapposite, and that *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), which is Petitioners' closest case in point, is still substantially

different on its facts, relating as it does to individualized assistance to a single handicapped student attending a parochial school, whereas this case involves a massive program of assistance to entire parochial schools, constitutes a clear example of a fusion of government and religious activities and unnecessarily places public employees in a position were they are likely to support the religious mission of parochial school.

ARGUMENT

I.

RULE 60(b) IS NOT A PROPER VEHICLE TO RECONSIDER THIS CASE.

Relying on dicta by members of this Court in an unrelated decision, Petitioners seek to reargue, under the guise of Rule 60(b), an appeal they lost in the Court more than twelve years ago. This unprecedented use of Rule 60(b) violates any reasonable interpretation of the scope of that rule, and threatens to compromise the institutional integrity of the Court. To hold that views of individual Justices — whether expressed in dicta, speeches, or law review articles — may constitute a "significant change in law" under Rule 60(b) would validate "head-counting" and speculation as a ground for relief from final judgments. Whatever this Court's views on the continued vitality of *Aguilar v. Felton* as a statement of Establishment Clause doctrine, Petitioners' Rule 60(b) motions are not proper vehicles to revisit the merits of a twelve-year-old decision. Petitioners do not meet the movant's burden under Rule 60(b)(5) which this Court has described as follows:

> Rule 60(b)(5) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application," not when it is

> no longer convenient to live with the terms of a consent decree. . . . A party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law.

Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 383-84 (1992).[2]

A. The Dicta in *Kiryas Joel* Are Not A Change In Law Justifying Relief Under Rule 60(b)(5).

In support of their contention that there has been a "significant change in law," Petitioners rely on dicta of individual Justices in dissenting and concurring opinions in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994). The *Kiryas Joel* majority mentioned *Aguilar* only in passing, *id.* at 2485. Armed only with this less-than-definitive dicta, Petitioners moved before the district court under Rule 60(b) on the ground that "the criticisms of *Aguilar* by five Supreme Court justices in the *Kiryas Joel* case not only portend a significant change in the law, but actually constitute one." (Dist. Ct. Op. at 5-6., referred to at JA 301.)

"[T]his Court does not decide important questions of law by cursory dicta inserted in unrelated cases." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968); *see also Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) (broad language unnecessary to Court's decision cannot be considered binding authority). Not only does dictum lack binding authority, it is an

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2. Although *Rufo* involved a consent decree, the district court held (Dist. Ct. Op. at 6), and petitioners agree, that *Rufo*'s general statements concerning the appropriate standard for relief under Rule 60(b) are applicable here.

unreliable predictor of how individual Justices, much less the Court, will decide constitutional questions. On more than one occasion, members of this Court have decided an issue in a manner inconsistent with their earlier suggestions in dicta. *Compare O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996) *with Rutan v. Republican Party*, 497 U.S. 62, 92 (1990) (Scalia, J., dissenting, joined by Rehnquist, C.J., Kennedy, J., and in part by O'Connor, J.); *and Planned Parenthood v. Casey*, 505 U.S. 833 (1992) with *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (plurality opinion of Rehnquist, C.J., joined by White and Kennedy, JJ.), and *id.* at 522 (O'Connor, J., concurring).

Justices' dicta do not and cannot amount to a change in the law. Article III of the Constitution requires a "case or controversy" before this or any other federal court is authorized to construe the law, and equating the *Kiryas Joel* dicta with a "significant change in law" would countenance precisely the kind of advisory opinions the case or controversy requirement forbids. The district court, and the court of appeals which adopted the district court's opinion, recognized that *Aguilar* remains controlling law. Therefore the *Kiryas Joel* dicta simply do not constitute a "significant change in law" warranting relief under Rule 60(b).

B. Alleged Changes In Factual Conditions And Law Are No Basis For Petitioners' Invocation of Rule 60(b).

No doubt recognizing that the comments in *Kiryas Joel* are a dubious basis for their Rule 60(b) motions, Petitioners now propose other possible justifications for overruling *Aguilar*.[3] In

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3. In their brief before the court of appeals, the Chancellor and Board of Education made clear in the only point heading of their argument that they were relying solely upon the *Kiryas Joel* dicta:

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particular, they point to the "enormous cost of compliance" with *Aguilar* as well as "intervening developments" in the governing Establishment Clause principles. (Agostini Br., p. 46.) These additional grounds, however, did not and could not form the basis for Petitioners' Rule 60(b) motions.

As noted above, Petitioners knew the cost of complying with *Aguilar* for almost a decade before they sought relief from that decision, allegedly on that basis, under Rule 60(b). Thus, that cost of compliance cannot represent the requisite significant change in circumstances warranting relief under Rule 60(b) according to one of the cases on which they rely most heavily (*Rufo*, 502 U.S. at 384), and their motion under the Rule, to the extent it is based on that cost, must be denied.

Similarly, Petitioners' reference to "intervening developments" in decisional law provides no basis to invoke Rule 60(b). It is undisputed that no decision has overruled

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> THE INJUCTION CONTAINED IN THE SEPTEMBER 26, 1986 JUDGMENT IS NO LONGER PROPERLY SUPPORTED BY ESTABLISHMENT CLAUSE JURISPRUDENCE. A MAJORITY OF THE CURRENT MEMBERS OF THE SUPREME COURT HAVE CALLED FOR RECONSIDERATION OF *AGUILAR v. FELTON*. THUS DEFENDANTS ARE ENTITLED TO RELIEF FROM THAT INJUNCTION PURSUANT TO RULE 60(b)(5). SHOULD THIS COURT DETERMINE THAT THE DISTRICT COURT PROPERLY DENIED OUR MOTION, WE RESPECTFULLY REQUEST THAT IT DECIDE THIS APPEAL EXPEDITIOUSLY SO THAT DEFENDANTS MAY PROMPTLY SEEK SUPREME COURT REVIEW.

(Brief of Defendants-Appellants to Court of Appeals for the Second Circuit ("Bd. App. Br.") at 38.)

Aguilar.[4] The cases cited by Petitioners applied this Court's Establishment Clause doctrine; these cases have not "changed to make legal what the decree [in *Aguilar*] was designed to prevent." *Rufo*, 502 U.S. at 388-89. To hold that interpretation of law automatically opens the door for relitigation of the merits of every potentially affected judgment would significantly undermine finality of judgments. *Id.*

Since there has been no change in factual circumstances or change in the law, Petitioners' motions must depend entirely on the dicta in *Kiryas Joel* as their sole basis for moving under Rule 60(b)(5). Because, as explained above, dicta does not constitute a change in law, the courts below properly denied Petitioners' motions.

C. Rule 60(b) Does Not Empower Courts to Overturn Valid Precedent Under the Circumstances Presented by This Case.

Rule 60(b) is not a source of judicial power.[5] Indeed, the

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4. The very fact that Justices critical of *Aguilar* have called for its reconsideration in a proper case conclusively proves that it has not been overruled.

5. Rule 60(b), including its residual clause (6), merely codified writs of equity. *See* Fed. R. Civ. P. 60(b); *id.* advisory committee's note, 1946 amendment (Rule 60(b) permits "the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules" and "does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief."); *see also* 6A J. Moore, *Moore's Federal Practice* ¶ 60.04[1] at 60-34 to 60-35 (2d ed. 1996) (hereinafter, "*Moore's*"); 7 *Moore's* ¶¶ 60.26[1], [4], 60.27[1], at 60-242, 60-251 to 60-252, 60-265.

The residual clause (6) of Rule 60(b) — which authorizes relief from

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Federal Rules of Civil Procedure are proscribed by the Rules Enabling Act from abridging, enlarging, or modifying any substantive right. *See* 28 U.S.C. § 2072(b) (1994); 28 U.S.C. § 723b (1940). Unable to meet the burden of showing a significant change either in factual conditions or in law, *Rufo*, 502 U.S. at 383-84, Petitioners seek to justify their invocation of Rule 60(b) with sweeping statements about the broad equity powers of the federal courts. However, although "the remedial powers of an equity court must be adequate to the task, . . . they are not unlimited." *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (internal quotation omitted). Moreover, Petitioners mistakenly assume that the powers of an equity court are equally broad in all circumstances. Although a court may possess "broad plenary power" to formulate equitable relief in the first instance, that court may reassess a permanent injunction after entry of final judgment only when warranted by provisions of Rule 60(b). *See* 7 *Moore's* ¶ 60.26[4] at 60-256 to 60-257.

Nor can hopeful prognostication about a possible change in law establish the extraordinary and compelling circumstances that this Court has required to justify relief under clause (6) of Rule 60(b). *See Klapprott v. United States*, 335 U.S. 601 (1949) (clause (6) appropriate vehicle to obtain vacatur of default judgment revoking citizenship where movant was ill, penniless, and in jail at time judgment was entered); *Ackermann v. United States*, 340 U.S. 193 (1950) (movant who, on basis of alleged financial inability, did not appeal denaturalization proceedings

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judgments for "any *other* reason justifying relief from operation of the judgment," Fed. R. Civ. P. 60(b)(6) (emphasis added) — is available only for circumstances not addressed by clauses (1) through (5). *See generally* 7 *Moore's* ¶ 60.27[1] at 60-266 & 60-266 n.12. Thus, insofar as petitioners cannot prove a "significant change in law" under clause (5), they may not fall back on clause (6) claiming an *anticipated* change in the law. Rule 60(b)(6) does not enlarge or modify the grounds for relief from a judgment; it merely "incorporates generally the substance of the old common law and equitable ancillary remedies." *Id.* at 60-265.

which government later admitted were not supported by sufficient evidence, did not state compelling reasons for relief under clause (6)); *see generally* 7 *Moore's* ¶ 60.27[1] at 60-270 (movant under Rule 60(b)(6) must allege and prove exceptional and compelling circumstances).

Petitioners' reliance on *Standard Oil Co. v. United States*, 429 U.S. 17 (1976), fails to offer succor. In *Standard Oil*, the oil company moved to set aside a judgment based on alleged misconduct by Government counsel and a material witness. Although the judgment had been summarily affirmed by the Supreme Court, the Court held that appellate leave was not procedurally required in order for the district court to "entertain" the Rule 60(b) motion. The question presented here is different: May the Supreme Court on appellate review of a properly decided 60(b) motion use the motion as a vehicle to overturn controlling precedent?

Rule 60(b) has never been used for the purposes which Petitioners seek, and for good reason: both as a matter of law and logic, it cannot itself be the vehicle to obtain a change in the law. The Court should not countenance such legal bootstrapping.

D. Rule 60(b) Does Not Permit Unsuccessful Parties to Relitigate Their Cases Before This Court.

The Secretary, at an earlier stage of these proceedings, acknowledged that there is no precedent for this Court's reconsideration of *Aguilar* in the procedural posture of this case:

> We are not aware, however, of any instance in which the Court has reconsidered the merits of a prior decision in the same case in a procedural posture similar to this one in

> which the case returned to this Court from a lower court after entry of a final judgment on remand and denial of a motion for relief from that judgment.

(Sec'y Br. in Support of Cert. Pet. at 11-12.)[6]

The reasons for this lack of precedent is obvious. This Court has long understood that it should not allow unhappy litigants to return to the Court with "the same questions which were open to dispute" during their initial appearance before the Court. *Illinois v. Illinois Cent. R.R. Co.*, 184 U.S. 77, 91-92 (1902) (internal quotation omitted). Such a policy, the Court noted, "would lead to endless litigation . . . if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms of their opinions. . . ." *Id.* (internal quotation omitted)[7] By permitting reconsideration of *Aguilar*, the Court would encourage unsuccessful parties to attempt to relitigate issues whenever they believe the Court might be willing to overrule a prior decision. But Rule 60(b) was never intended to serve as a

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6. The Secretary's current position endorsing Petitioners' use of Rule 60(b) is a departure from his position in the court of appeals. There, the Secretary took no position on whether Rule 60(b) was a proper vehicle for seeking relief from the judgment in this case, and acknowledged that the district court did not abuse its discretion in denying Petitioners' motion. (Sec'y App. Br. at 12.) The Secretary now argues in support of this Rule 60(b).

7. More recently, an appellate court panel rejected a government defendant's attempt to use Rule 60(b) as a means of reinterpreting the law upon which a consent decree was based, and then modifying the decree subsequent to that very reinterpretation. *Fortin v. Commissioner Mass. Dep't of Pub. Welfare* 692 F.2d 790 (1st Cir. 1982). To permit such procedural maneuvers, the court of appeals for the First Circuit wrote, "would transform the modification procedure into an impermissible avenue of collateral attack. . . ." *Id.* at 799.

substitute for, or a second attempt at, a timely appeal of the merits of a final judgment.[8]

Compounding problems inherent in using Rule 60(b) as a vehicle for reconsidering the merits of a prior decision, Petitioners here rely on dicta as the basis for their prediction that the Court as presently constituted would decide *Aguilar* differently from the Court sitting twelve years ago. Indeed, if this premise is validated, any public statement by a Justice — whether in a dissenting opinion, an opinion attached to a denial of certiorari, or even a speech or article — could provide grist for a Rule 60(b) motion by an unsuccessful litigant seeking to overturn a prior decision. Cases decided by narrow majorities would be particularly susceptible to relitigation by parties who might view an intervening change in the Court's membership — or a perceived change of opinion by a Justice — as a basis for moving under Rule 60(b).

E. Use of Rule 60(b) in the Fashion Proposed By Petitioners Will Increase Burdens on the Federal Court System.

Petitioners and the Secretary acknowledge that, because the lower courts were bound to follow the directly controlling authority of *Aguilar, only* this Court can grant Petitioners' Rule 60(b) motion. (Agostini Petitioners' Br. at 47; Sec'y Br. at 44.) Moreover, they urged the lower courts promptly to deny their motion in order to facilitate expedited review by the Supreme

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8. To discourage litigants from Rule 60(b) motions to reargue the merits of their cases, most appellate courts refuse to consider the substance of the underlying judgment when a denial of a Rule 60(b) motion is presented on appeal. *Browder v. Director Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978); *see, e.g., Calumet Lumber Inc. v. Mid-America Indus., Inc.*, 103 F.3d 612, 615 (7th Cir. 1996); *Wilson v. Fenton*, 684 F.2d 249, 251 (3d Cir. 1982); *Silas v. Sears, Roebuck & Co., Inc.*, 586 F.2d 382, 386 (5th Cir. 1978).

Court.[9] Petitioners thus seek to vest this Court with a novel form of jurisdiction — a hybrid of original jurisdiction and rehearing under Supreme Court Rule 44. This use of Rule 60(b) undermines the numerous safeguards carefully crafted by Congress and the Court to limit this Court's caseload.

Access to this Court has been continually narrowed by various "gate-keeping" measures. For example, Congress recently eliminated substantially all of the Court's mandatory review obligations by eliminating its appellate, as opposed to certiorari, jurisdiction over state and federal court rulings. *See* Pub. L. No. 100-352, 102 Stat. 662 (June 27, 1988) (amending 28 U.S.C. §§ 1254 and 1257). Similarly, the Court itself has insisted upon an increasingly sparing use of its original and certiorari jurisdiction and its power to grant rehearing. *See United States v. Nevada*, 412 U.S. 534, 538 (1973) (denying leave to file original complaint: "We seek to exercise our original jurisdiction sparingly"); *Louisiana v. Texas*, 176 U.S. 1, 15 (1900) (original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute"); *see also Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (Court will decline jurisdiction where state court ruled on adequate and independent state ground).

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9. In its brief below, the Board urged the court of appeals as follows: "Should the Court agree with the District Court that in the absence of an explicit overruling of *Aguilar* by the Supreme Court, it is constrained not to grant relief to defendants, we respectfully request that the Court issue its order promptly so that defendants may seek Supreme Court review as quickly as possible." (Bd. App. Br. at 46.) *See also* n.4. Similarly, counsel for the Board reiterated this point at oral argument as follows: "We'd ask the Court, if you are inclined to deny the motion, we'd respectfully request that you do so quickly so that we can move on." (JA 773).

In the face of these efforts to narrow the Supreme Court's jurisdiction and caseload, Petitioners' use of Rule 60(b) represents a new, "back-door" mode of access to the Court which, if kept open, will invite other unsuccessful litigants to bring Rule 60(b) motions in the lower courts. It is no response to Respondents' concerns about the propriety of the use of Rule 60(b) to assert that "meritless attempts to gain reconsideration of precedent will be answered appropriately." (*See* Sec'y Br. at 16.) Even if meritless Rule 60(b) motions are denied by the lower courts, as occurred here, there is still nothing to prevent disappointed litigants from bringing the motions in the first place, appealing their denial, and then filing petitions for certiorari in this Court. The burden on the federal Courts will certainly increase if Rule 60(b) becomes available as a newly broadened procedural device to reconsider decisions.

In addition to increasing the Court's burden in the exercise of its certiorari jurisdiction, Petitioners' proposed use of Rule 60(b) would undercut the carefully designed strictures of Supreme Court Rule 44 governing rehearings. This Court rarely grants rehearing in deference to the interests of finality and in recognition of its limited capacity to reexamine the same issues in the same case repeatedly. *See* R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* 620 (7th Edition 1993).[10] The Court's procedures on rehearing were intended to limit the number of rehearing petitions and to deter disappointed litigants from seeking rehearing simply because changes in the Court's personnel renewed their hopes for success.[11] *See id.*

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10. From 1976 to 1982, only six petitions for rehearing were granted out of an average of over 100 per year in nonindigent cases; during the 1989-1991 Terms, only two petitions for rehearing were granted of the 1386 petitions that were filed. *Supreme Court Practice* 620.

11. For example, Justices who did not participate in the original consideration of a case typically do not participate in deciding whether a

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F. Petitioners' Proposed Use of Rule 60(b) Will Erode the Institutional Integrity of the Court.

The legitimacy of the Supreme Court derives from its steadfast adherence to the rule of law and its refusal to countenance the notion that constitutional doctrine vacillates merely because of changes in the Court's membership. If the Court permits Petitioners' misuse of Rule 60(b), perception of the Court as an institution is likely to be diminished. The important policies embodied in the doctrines of *stare decisis* and law of the case will necessarily be eroded if a departure from *stare decisis* appears to be based on Justices' political ideology rather than principles of law. *Stare decisis* is a principle "of fundamental importance to the rule of law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1988) (Kennedy, J.) (internal citations omitted).

Abandoning principles of *stare decisis* to overrule a case "upon a ground no firmer than a change in [the Court's]

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petition for rehearing will be granted. *Supreme Court Practice* 621; *see, e.g., Associated Press v. Walker*, 389 U.S. (1967). Also, the Court grants petitions for rehearing only if at least one of the Justices who concurred in the original judgment, with the concurrence of a majority of the Court, agrees to grant the rehearing. Sup. Ct. R. 44.1; *see Ambler v. Whipple*, 90 U.S. (23 Wall.) 278, 281-82 (1874).

For these reasons, the Secretary's casual suggestion that the Court could simply treat the petitions for certiorari as petitions for rehearing (Sec'y Br. at 51 n.8) overlooks the fact that a rehearing of *Aguilar*, some twelve years after it was decided, is no longer authorized by the rules and practices of this Court. If these practices were followed in this case, and the only remaining Justice who voted with the majority in *Aguilar* voted to grant rehearing, the additional affirmative votes of the remaining two Justices eligible to vote on rehearing would be insufficient to achieve the "majority of the Court" necessary to grant rehearing under Rule 44.1.

membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception can do more lasting injury to this Court and to the system of law." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting); *see also Casey*, 505 U.S. at 864 ("To overrule prior law for no other reason than [a present doctrinal disposition to come out differently] would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.")

"The rule of law is about form."[12] Petitioners' use of Rule 60(b) damages the process by which consideration of a case must proceed. Because our legal system derives much of its legitimacy from adherence to and respect for form, this Court should rebuff Petitioners' inappropriate use of Rule 60(b). There is nothing inequitable about a rule of law which provides that a party that has had a full and fair opportunity to litigate its claim to the Supreme Court is bound by the decision.

For these reasons, Respondents respectfully submit that permitting Petitioners' use of Rule 60(b) to seek rehearing in a case they lost before the Supreme Court, based on passing statements by individual Justices, would elevate expediency over the bedrock principles of fairness and finality upon which this Court, and our system of law, were built.

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12. A Scalia, *A Matter of Interpretation: Federal Courts and the Law* 25 (1997).

II.

THE PRE-1985 NEW YORK CITY PROGRAM UNDER WHICH PUBLIC SCHOOL TEACHERS AND COUNSELORS PROVIDED TITLE I SERVICES INSIDE PAROCHIAL SCHOOLS WAS, AND IF RE-INSTITUTED WOULD BE, A VIOLATION OF THE ESTABLISHMENT CLAUSE UNDER DECISIONS OF THIS COURT, IN ADDITION TO *AGUILAR*, THAT HAVE NEVER BEEN CALLED INTO QUESTION.

A. Petitioners' Abuse of The Concept of "Neutrality".

Petitioners quote from opinions of this Court recognizing that government should maintain "neutrality" towards religion, and that the Establishment Clause should not be construed to the contrary. (Chancellor's Br., pp. 27-29; Agostini Br. 15-21.).[13] As Petitioners are obliged to acknowledge, however, it is not enough in this Court to rely on generalities, and even " 'the Establishment Clause's concept of neutrality may not be 'self-revealing.' " (Agostini Br., p. 15, quoting *Lee v. Weisman*, 508 U.S. 577, 627 (1992) (SOUTER, J., concurring). Clearly, whether the Program in question in this case is, or is not, "neutral" towards religion depends upon the particular relevant and material facts of the Program (some of which, as will be noted below, have never been fully and properly explored). As Petitioners further acknowledge,

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13. In his brief, the Secretary of Education appears to confine his argument to the point that *Aguilar* allegedly represents "A Departure From Most Of The Court's Previous Entanglement Cases" (Secretary's Br., pp. 23-36), as if in reviewing the constitutionality of the (pre-*Aguilar*) Program, this Court should only consider the Program within the limited confines of the doctrine of "excessive entanglement." The Agostini Petitioners, correctly, do not appear to take that approach.

> "Every government practice must be judged in its unique circumstances to determine whether it is an endorsement or disapproval of religion" [quoting *Capitol Square Review & Advisory Bd.*, 115 S. Ct. 2440, 2454 (1995) (O'CONNOR, J., concurring in part and concurring in the judgment)]. Both "the history and administration of a particular practice" must be examined. *Id.*

(Agostini Br., p. 25.)

Further acknowledging that they must define "neutrality" in order to make it sustain the Program in question in this case, Petitioners propose "neutrality" is promoted when "government benefits are made available generally to a broad class of citizens defined without reference to religion." (Chancellor's Br., p. 25; Agostini Br., p. 16.) Subsequently, however, they concede that "neutrality" is not "promoted," and the Establishment Clause is violated, when a government Program " 'in effect subsidize[s] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.' " (Agostini Br., p. 22, quoting *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12, which in turn quoted *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 397; Chancellor's Br., p. 30.)

Respondents respectfully submit, however, that reference to "neutrality," even as thus defined, does not dispose of the question whether the Program here under consideration falls within one of the two aforementioned categories. Petitioners appear to ignore the possibility that the Program may, and probably does, to some extent fall within both categories, further complicating the question whether the Program merely promotes "neutrality" or offends the Establishment Clause. (This fact,

Respondents reiterate, further demonstrates the impropriety of resolving that question in this unique proceeding based on a record in which the question was never addressed by the parties or determined by any court, including the Court that decided *Aguilar*.)

Reference to the concept of "neutrality" also fails to dispose of another serious question: whether in the Program, in which public school teachers and guidance counselors performed their services inside the parochial schools of New York City, "the instructional services offered by the state effected a 'symbolic union of church and state' that was 'sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices.' " (Agostini Br., p. 24, *quoting Grand Rapids*, 473 U.S. at 390.) The Chancellor and Board of Education appear to ignore this question entirely, although it was addressed by the parties, and, Respondents respectfully submit and will demonstrate below, was correctly and effectively resolved by the Court in *Aguilar*).

Lastly, reference to the concept of "neutrality" does not dispose of the question explicitly resolved in *Aguilar*: (a) whether it was reasonable and proper under the Establishment Clause and the decisions of this Court thereunder to guard against public school teachers and guidance counselors engaging in conduct supportive of the religion or religious mission of the parochial schools by prohibiting them from performing services inside those schools under the auspices of the pre-1985 Title I Program in New York City; or (b) whether it should have been assumed that those teachers and counselors would not engage in such conduct by reason of their professional training, the details of the Program in question, and the fact that they were state employees under state control, until there was proof to the contrary. (Secretary's Br., p. 30; Chancellor's Br., p. 32; Agostini Br., pp. 32-35.)

In *Aguilar*, the Court decided in favor of the prophylactic approach under the rubric of the doctrine of "excessive entanglement." The Secretary takes the position that this decision was allegedly not in accord with the Court's pre-*Aguilar* decisions, a position with which we respectfully disagree, and note only that it is one of three serious questions in this case not resolved by general reference to the concept of "neutrality."

The Agostini Petitioners, while taking the same position as the Secretary on this third question, launch an attack on the entire doctrine of "excessive entanglement" (Agostini Br., pp. 28-32), and the Chancellor and Board of Education call into question, albeit briefly, the entire three-prong test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). (Board Br., p. 31.) As noted, the Secretary takes the more measured position that in *Aguilar*, the doctrine of "excessive entanglement" was merely applied improperly.

Respondents respectfully submit that this unique proceeding, in which Petitioners seek to overturn a twelve-year-old decision of this Court, essentially on the original record, under a procedural rule never before used for such purpose, is questionable enough without being used as a springboard to overturn substantive rules of law that have guided this Court in its decisions for more than 25 years, and continue to guide lower courts every day.

In this brief, therefore, Respondents will eschew defending the three-prong test in *Lemon*, including the "entanglement" prong, worthy as we believe that test to be. Instead we will confine ourselves to demonstrating, as we believe we can, by reference to the decisions of this Court in cases before and after *Aguilar*, that the Program in the present case violated the Establishment Clause.

In short, Respondents believe that, contrary to our adversaries' position, the propriety or impropriety of the prophylactic approach adopted by this Court in *Aguilar* can hardly be determined by reference to the general concept of "neutrality"; that such approach is consistent with other decisions of this Court; and that it is a reasonable and salutary application of the Establishment Clause whether or not it is considered under the rubric of the doctrine of "excessive entanglement."

B. Petitioners' Cases Are Inapposite.

The Chancellor and Board of Education begin the list of cases they cite by referring to *Kiryas Joel* and the comments of the Justices concerning *Aguilar*. (Chancellor's Br., p. 24.) Respondents believe that those comments are not, as the Chancellor and the Board indicate, dispositive of the constitutional issue on this appeal. We choose to rely on the statement concerning those comments in the decision of the District Court in this proceeding:

> [I]t is possible to make too much of the *Aguilar*-bashing . . . . The various comments about the decision in *Kiryas Joel* were made (or joined in) without the benefit of briefing and oral argument, and three of the five Justices were not on the Court when it decided *Aguilar*.

(Appendix to Chancellor's Pet. for Cert., p. 16, n. 1.)

With two exceptions, Petitioners cite cases decided by this Court after *Aguilar*. In the first exception, *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court held that a state statute did not violate the Establishment Clause by allowing students

attending "non-profit" schools, including religious schools, to ride free of charge on public transportation. Petitioners cite *Everson* for the Court's general comment on "neutrality." The most striking comment of the Court in *Everson*, however, and the one universally accepted as indicating its significance was that

> There MR. JUSTICE BLACK, writing for the majority, suggested that the decision *carried "to the verge" of forbidden territory under the Religion Clauses.*

BURGER, C.J., writing for the Court, in *Lemon*, 403 U.S. at 612 (emphasis added).

Despite Justice Black's assurance, moreover, a vigorous and prophetic dissenter, called attention to the fact that

> Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into public schools. The other, to obtain public funds for the aid and support of various private religious schools.

Everson, 330 U.S. at 63 (RUTLEDGE, J., dissenting.)

In the one other pre-*Aguilar* decision of this Court cited by Petitioners, *Board of Education v. Allen*, 392 U.S. 243 (1968), the Court held that a state statute did not violate the Establishment Clause by allowing the state to lend non-religious textbooks to students at certain grade levels, including those attending parochial schools. In subsequently refusing to extend

what Respondents respectfully submit was, in *Allen*, the high-water mark of any form of government aid to parochial schools students, this Court noted:

> In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.

BURGER, C.J., writing for the Court in *Lemon*, 403 U.S. at 616.

Most of the decisions subsequent to *Aguilar* on which Petitioners rely have far less relevance than *Everson* or *Allen* to the use of public funds for education and educational procedures inside parochial schools or, more specifically, the use of public funds to provide teachers, counselors or assistants in those schools. Thus, in *Mueller v. Allen*, 463 U.S. 388 (1983) the Court upheld a state statute providing a limited tax deduction to taxpayers for sums spent on dependents attending elementary and secondary schools, including parochial schools.

In *Board of Education v. Mergens*, 496 U.S. 226 (1990), the Court upheld a federal statute that guaranteed student religious groups in public institutions equal access with non-religious groups to school rooms in order to hold meetings (following the holding in a similar case, *Widmar v. Vincent*, 454 U.S. 263 (1981), which preceded *Aguilar*).

In *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 115 S. Ct. 2510 (1995), on which Petitioners rely heavily, the Court held that a university violated the free speech rights when it refused to pay, out of a general fund held for student purposes, the printing costs of a student journal that promoted a particular religious point of view.

As can readily be seen, none of the above cases even remotely involved parochial schools (with the possible exception of *Mueller*, and then only very indirectly), no less the use of public funds to provide teachers, counselors or assistants of any kind to instruct, counsel or otherwise assist students inside those schools. Additionally, *Mergens*, *Widmar* and *Rosenberger* involved the Free Speech Clause of the First Amendment as much as, if not more than, the Establishment Clause. The application of the general concept of "neutrality" to the facts of those cases, Respondents respectfully submit, presents a far different question, or far different questions, from the application of the concept to the facts of *Aguilar*.

The facts in only two of the cases cited by Petitioners bear any resemblance to the facts in *Aguilar*, and not a very close resemblance at that.

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court held that a public school district did not violate the Establishment Clause by providing a sign-language interpreter to a deaf student on the premises of a parochial school, even though the interpreter transmitted religious matter to the student.

Similarly, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court allowed a State to provide vocational rehabilitation assistance to a blind student at a religious college.

To begin with, it bears noting that *the very same Court that decided Witters, establishing a precedent for Zobrest, had decided Aguilar, and all five of the Justices who formed the majority in Aguilar joined in the decision in Witters.*

At this point, it is also important to note that *all of the Justices who joined or concurred in the decision in Grand Rapids also joined in the decision in Witters.* Clearly, those Justices saw a distinction between the cases. Respondents respectfully submit that the distinction they saw has continued to be recognized, is valid on the facts and the law, and should be dispositive of Petitioners' attempt to persuade this Court to overrule *Aguilar.*

C. *Aguilar* Is Consistent with this Court's Oldest and Most Recent Decisions in Point.

Respondents respectfully submit that (the pre-*Aguilar*) Program violated the Establishment Clause in three ways:

(1) The symbolic union of church and state inherent in public school teachers and guidance counselors providing instruction and counseling inside parochial schools conveyed a message of government support for the religious mission of the schools to the students attending them and the general public.

(2) The Program in effect subsidized the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching essential secular subjects to a substantial portion of their students.

(3) The only reasonably certain way to make sure that the public school teachers and counselors obliged to

> teach and counsel parochial school students would not be encouraged by their surroundings to engage, deliberately, ignorantly or inadvertently, in conduct supportive of the parochial school and its religious mission was to prohibit them from performing their services inside the parochial schools.

1. The Program Was Impermissible Because It Created A Symbolic Union Of Church And State.

As noted, only the Agostini Petitioners address this question. In doing so, they argue against Respondents' position only by comparison of the Program in *Aguilar* to the two programs struck down in *Grand Rapids* (Agostini Br., pp. 24-25). They point to the fact that in one of the two programs in *Grand Rapids* full-time teachers in the sectarian schools were hired. They then go on to say that thereby, allegedly "the public and private programs were 'united' in a single set of teachers." (*Id.*, p. 25). Respondents would have to spend a substantial amount of time trying to decipher that argument, but there is no need to do so. When Justice BRENNAN, who wrote for the majority of the Court in *Grand Rapids*, wished to exemplify what he meant by "symbolic union," *he quoted from the Court of Appeals decision in Aguilar describing the Program under consideration in Aguilar!*

> As Judge Friendly, writing for the Second Circuit in the companion case [*Aguilar*] to the case at bar, stated:
>
> > Under [New York] City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same building, teach the same

> students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to be a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public. *Felton v. Secretary, United States Dept. of Ed.*, 739 F.2d 48, 67-68 (1984). This effect — the symbolic union of government and religion in one sectarian enterprise — is an impermissible effect under the Establishment Clause.

473 U.S. at 392.

As noted by Justice BRENNAN, the concept of a symbolic union of government and religion having the effect of showing government approval of religion and thereby violating the Establishment Clause predates *Grand Rapids*, 473 U.S. 389-90. It was the rationale of the decision in *McCollum v. Board of Education*, 333 U.S. 203 (1948) (public school prohibited from allowing part-time religious instruction on its premises as part of its school Program, although participation was voluntary and instruction was provided by non-public school personnel); *Abingdon School District v. Schempp*, 374 U.S. 203, 222 (1963) ("powerful sects or groups might bring about a fusion of governmental and religious functions . . . to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies"); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (state statute prohibited from vesting in governing bodies of schools and churches power to veto liquor licenses for premises within 500-foot radius).[14]

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14. *Larkin* is not distinguishable by reason of the veto power given to the churches. As noted above, under Title I, just such a veto power is available (Cont'd)

2. *The Program Subsidized The Religious Functions of The Participating Parochial Schools.*

The Agostini Petitioners are also alone in dealing with this point. With all due respect, they also do not help to clarify either this question or its answer; rather, they slur over the distinct difference between "*direct grants*" of government aid resulting in impermissible subsidization of parochial schools, without public funds being paid to the parochial schools, and "*direct funding*" in which government money is paid directly and impermissibly to parochial schools. It is clear that the programs in *Grand Rapids* were held to constitute "direct grants" because the Court determined that the aid given to the parochial schools in the form of publicly paid teachers who provided instruction in secular subjects on the premises of those schools directly and substantially benefitted the schools by relieving them of their responsibility to provide instruction in such subjects. 473 U.S. at 395.

In *Zobrest* (and also in *Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996)), *petition for cert. pending, No. 96-776*, cited by the Chancellor and Board of Education in another context [Br., p. 22]), this Court (and the Second Circuit) distinguished the programs in *Grand Rapids* from the individualized assistance provided to a single handicapped student attending a parochial school by referring to the "direct grants" in *Grand Rapids* (*Zobrest*, 509 U.S. at 12). It seems clear that this Court (and the Second Circuit) were not referring to "direct funding," but

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(Cont'd)

to parochial school authorities. Despite the statutory language purporting to deliver benefits directly to students, no benefits can be delivered unless their school authorities elect to join a particular program, and the parochial school authorities have refused to do so when displeased with the program presented to them. (*Supra*, p. 9.)

merely to the benefit to the parochial schools in the City of Grand Rapids that resulted from the City providing publicly-paid teachers to instruct the students of those schools on premises.

In *Grand Rapids*, moreover, the Court rejected the argument that the aid, like the textbooks in *Allen*, flowed primarily to the students rather than to the parochial schools:

> Of course, all aid to religious schools ultimately "flows to" the students, and petitioners' argument if accepted would validate all forms of nonideological aid to religious schools, including those explicitly rejected in our prior cases. Yet in *Meek*, we held unconstitutional the loan of instructional equipment and in *Wolman*, we rejected the fiction that a similar program could be saved by masking it as aid to individual students. *Wolman*, 433 U.S. at 249, n. 16.

473 U.S. at 495.

Additionally, in *Grand Rapids*, the Court rejected the argument that the aid in question merely "supplemented" rather than "supplanted" the programs offered in the religious schools:

> First, there is no way of knowing whether the religious schools would have offered some or all of these courses if the public school system had not offered them first. The distinction between courses that "supplement" and those that "supplant" the regular curriculum is therefore not nearly as clear as petitioners allege. Second, although the precise course offered in these programs

> may have been new to the participating religious schools, their general subject matter — reading, mathematics, etc. — was surely a part of the curriculum in the past, and the concerns of the Establishment Clause may be triggered despite the "supplemental" nature of the courses. Third, and most important, petitioners' argument would permit the public schools gradually to take over the entire secular curriculum of the religious school, for the latter could surely discontinue existing courses so that they might be replaced a year or two later by a . . . course with the same content.

473 U.S. at 396.

This last point is critical in the present case, procedurally as well as substantively. Petitioners' argument that the Program here in question "supplemented" rather than "supplanted" comes in two parts. First, they argue that the Program only supplemented parochial school services because Title I requires that the aid provided thereunder must do so. Second, the Agostini Petitioners point to the bare (and identical) assertions of two Roman Catholic prelates that the courses in "remedial" reading and "remedial" mathematics in the Program allegedly did not "supplant" any courses in the curriculum of the Catholic parochial schools (JA 660 and 685). To these bare statements, the Agostini Petitioners add the argument that the Catholic prelates' assertions were never challenged by Respondents in the District Court.

Both arguments are specious. One of the procedural defects in this strange proceeding, purportedly under Rule 60(b), is that there was no opportunity afforded Respondents in the District

Court to argue any of the "merits" of the constitutional issue (JA 802). Even if there were, Respondents would not have risen to the bait because it has always been our position that we should not have had the obligation to come forward in the District Court with a defense of a decision of this Court that even the lower Court recognized it did not have the power to overrule.

Accordingly, Respondents respectfully submit there is a serious factual question in this case, never fully addressed by the parties, concerning whether the aid provided to parochial schools under the Program "supplemented" or "supplanted." We believe that the "remedial" instruction provided to parochial students in reading and math clearly "supplanted" efforts the parochial school teachers had previously made to bring their below-grade level students up to grade level. Conversely, we find it more than difficult to believe that if the Program had not been in operation, and public school teachers had not been sent to do the job, their parochial school counterparts would not have continued to do all in their power to bring their below-grade wards up to accepted norms.

3. The Program Is Impermissible Because There Is No Sure Way To Prevent Public Employees On Parochial School Premises From Supporting The Religion Or Religious Mission Of Those Schools.

Respondents respectfully submit that the essential determination in *Aguilar* is that there is no way to ensure that public school teachers and guidance counselors performing services inside a parochial school will refrain from engaging in conduct offensive to the Establishment Clause unless they are subject to systematic surveillance that would be too extreme to be workable. In *Aguilar*, in line with the three-prong test in *Lemon* and the application of that test in *Marborough* and *Meek*, the Court characterized any such program of surveillance as one

that would be afoul of the doctrine of "excessive entanglement." Respondents further submit, however, the reference to that doctrine is unnecessary; it should be sufficient to hold that under such circumstances it is reasonable and proper under the Establishment Clause, as a prophylactic measure, to prohibit public school teachers and guidance counselors, and certainly an entire group of public school teachers, from performing services inside parochial schools.

The Agostini Petitioners state that the principle criticism "of the entanglement prong is that it forbids what the 'effects' prong requires." (*quoting* McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 127-34). But there is no reason to assume that the "effects prong" requires a system of surveillance where none would be workable; rather, it is more reasonable to assume that the "effects prong" merely requires that conduct offensive to the Establishment Clause which can not be prevented by any workable system of surveillance should be prohibited.

Here, too, contrary to the Agostini Petitioners' argument, the question at hand cannot be resolved by reference to the general concepts of "neutrality" and "separation." (Agostini Br., p. 19.) Respondents respectfully submit that the question whether there is sufficient likelihood that a public school teacher or counselor placed on regular duty inside a parochial school, and incapable of being monitored, is likely to engage in conduct offensive to the Establishment Clause so as to make it reasonable and proper to prohibit such placement simply cannot be resolved by reference to such general concepts.

Nor can the question be resolved by reference to the argument that the prophylactic measure taken in *Aguilar* "reverses the traditional burden of proof that requires the plaintiff to establish a legal claim." (Agostini Br., p. 30.)

> [T]axpayers like these [*Aguilar*] plaintiffs .... cannot reasonably be expected to mount perpetual guard. In our view, the Court has been wise in relying upon reasoned apprehension of potentials rather than sanctioning case-by-case determination of the precise level of risk of fostering religion, since such an empirical approach would inevitably lead to litigation in an area where some degree of certainty is needed to prevent constant controversy.

Judge Friendly, writing for a unanimous Court of Appeals in *Felton*, 739 F.2d at 66.

The Agostini Petitioners base one of their main arguments on an erroneous version of the facts. Thus, they argue that supervision in this case is "*of* a public employee *by* a public employee." (Br., p. 33.) But the very reason why "supervision" to guard against conduct offensive to the Establishment Clause is unworkable in this case is that, if it were to approach being effective, it would have to encompass not only surveillance of the public school teachers and counselors, but their parochial school students, the parochial school teachers and principal, and the parents of the parochial school students.

The Agostini Petitioners find no fault with *Lemon* and the Court's statement therein that "a dedicated religious person, teaching in a school affiliated and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." (*quoting* 403 U.S. at 618; Agostini Br., p. 33). But, Respondents respectfully submit, that same description, word for word, would fit a Catholic public school teacher or counselor performing services in a Catholic parochial school or a Jewish public school teacher or counselor serving in a Hebrew Day school.

The Agostini Petitioners argue that *Lemon* was correct because the teachers there, although paid by a public agency, were "accountable to religious school officials," whereas in this case, presumably, the teachers and counselors are accountable to public school officials. Respondents respectfully submit that any person is more likely to be more "accountable" to those who pay his salary than anybody or anything else, except perhaps the payee's religious preference. An accompanying argument suggests that it should be assumed that public school teachers and counselors may be relied upon to refrain from engaging in conduct offensive to the Establishment Clause because to assume otherwise would be "demeaning to their professionalism." Any such argument is, to say the least, equally demeaning to the parochial school teachers in *Lemon* about whom no such assumption was made.

Lastly, the Agostini Petitioners fall back on the alleged fact that there was no incident "known" to the Chancellor in which any public school teacher or counselor in the (pre-*Aguilar*) Program engaged in any conduct offensive to the Establishment Clause. As noted above, however, there would have been no way that any such incident would have come to the attention of the Chancellor unless a teacher or counselor would have reported on his own misconduct.

Respondents submit that the prophylactic approach of the Court in *Aguilar* was particularly warranted in connection with a Program of remedial instruction in which public school teachers and counselors were presumably exercising their best efforts to raise parochial students' achievement to grade level. We submit the most fundamental task of such teachers or counselors must be to build the students' respect for and interest in study generally, but more particularly in their regular place of study, which in this case was a school whose only reason for existence was its religious mission.

CONCLUSION

In sum, Respondents respectfully submit that there are three powerful reasons to reaffirm *Aguilar* even without reference to the *Lemon* test or the doctrine of "excessive entanglement" (1) the symbolic union of church and state in the manifold relations in the (pre-*Aguilar)* Program between the public school teachers and counselors engaged in the Program and their parochial school counterparts, the parochial school principals and the parents of the parochial school students; (2) the substantial subsidization of the religious mission of the parochial schools by relieving them of the burden of bringing their below-grade level students up to grade level; and (3) the lack of any workable system of surveillance that would prevent public teachers and counselors performing services regularly inside parochial schools from engaging in conduct offensive to the Establishment Clause.

Respectfully submitted

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

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Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS RACHEL AGOSTINI, ET AL.

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REPLY BRIEF FOR PETITIONERS RACHEL AGOSTINI, ET AL.

Respondents urge the Court to avoid confronting the continuing vitality of *Aguilar v. Felton*, 473 U.S. 402 (1985), or, if it confronts that issue, to adopt one of several proposed alternative rationales for the result in *Aguilar*. The one argument that respondents do *not* make in their brief is that *Aguilar's* entanglement analysis should be reaffirmed. That omission is significant. It underscores petitioners' point that the law has changed since *Aguilar* was decided, and that

the continuing injunction in this case should be reassessed under prevailing Establishment Clause principles.

ARGUMENT

I. THE ISSUE OF *AGUILAR'S* CONTINUING VITALITY IS PROPERLY BEFORE THE COURT

Respondents recognize, as they must, that the federal courts have inherent power to modify or vacate continuing injunctions. They recognize, too, that under *Standard Oil Co. v. United States*, 429 U.S. 17 (1976), an application for relief from a judgment that was mandated or affirmed by this Court is properly directed to the district court under Rule 60(b). There is no question, therefore, that a motion under Rule 60(b) was the proper procedural vehicle for petitioners to seek the relief that they seek.

The only question is whether petitioners have stated adequate grounds for relief under Rule 60(b). Respondents suggest that there cannot be adequate grounds unless and until the decision in *Aguilar* has been overruled in another case—or, to put it another way, that this Court cannot overrule its prior decision on a Rule 60(b) motion in the same case. "The question presented here," they state, is this: "May the Supreme Court on appellate review of a properly decided 60(b) motion use the motion as a vehicle to overturn controlling precedent?" Br. Resp. 21.

The answer to respondents' question is surely "yes." This Court can use any case over which it has jurisdiction as a vehicle to overrule one of its own precedents. And there is no question that the Court has jurisdiction over this case. The district court had jurisdiction to entertain the Rule 60(b) motions for relief from the judgment, the court of appeals had jurisdiction under 28 U.S.C. § 1291, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

That the decision requiring entry of the injunction in this case has not been overruled already is no barrier to the granting of relief under Rule 60(b). That is typically the case with a Rule 60(b) motion: the decision that is the subject of the Rule 60(b) motion has not been overruled or set aside before the motion is made. The question on the motion is whether the prior decision should be set aside, not whether it already has been.

The grounds for setting aside a prior judgment—in particular, a continuing injunction—are broadly stated in Rule 60(b): that "it is no longer equitable that the judgment should have prospective application," or "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(5), (6). If this Court is of the view that the Establishment Clause was misinterpreted in *Aguilar*—that there is no constitutional impediment to an on-premises Title I program—then that is as powerful a reason as there could be to grant relief from the continuing injunction that prohibits such a program. Likewise, if the Court is persuaded that *Aguilar* has "foreclos[ed] a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community," *Wolman v. Walter*, 433 U.S. 229, 247 n.14 (1977), that is another powerful reason for granting relief from the judgment.

There is no reason to fear, as respondents suggest, that granting relief in this case will encourage litigants to misuse Rule 60(b) as a device for a second appeal or as a substitute for a timely petition for rehearing. Nor is there reason to fear that the courts will be burdened by Rule 60(b) motions whenever there is a change in the composition of the Court. Those suggestions trivialize the extraordinary circumstances that warranted petitioners' request in this case.

First, as a practical matter, the continuing injunction was having a devastating effect on Title I programs in New York

City and throughout the country. In New York City alone, over one hundred million dollars had been wasted on the additional costs of compliance with *Aguilar*, and services were being denied to thousands of needy children every year.

Second, as a legal matter, there had been significant changes in the governing Establishment Clause principles. As explained in our initial brief, the "excessive entanglement" prong upon which *Aguilar* was based appeared to have been abandoned, and the principle of neutrality had been applied in a way that appeared to foreclose any other rationale for the result in *Aguilar*. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 115 S. Ct. 2510 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bowen v. Kendrick*, 487 U.S. 589, 615-16 (1988); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). Thus, petitioners did not rely simply upon a change in the Court's membership, nor were they simply rearguing the case they had lost. They were able to demonstrate, in the district court's words, that "[i]n the years since the Supreme Court's *Aguilar* decision, the landscape of Establishment Clause decisions ha[d] changed." Pet. App. 4a.

Third, in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), a majority of the Members of this Court had explicitly criticized or questioned *Aguilar* and at least implicitly invited a request for its reconsideration. Contrary to respondents' contention, petitioners do not maintain that these individual expressions of opinion themselves constituted a change in law. The change in law was effected in other decisions of the entire Court in such cases as *Witters*, *Bowen*, *Zobrest*, and *Rosenberger*. But the individual expressions of five Justices in *Kiryas Joel*, which called for the overruling or

reconsideration of *Aguilar*, surely qualify as "other reason[s]" warranting a request for reconsideration. Fed. R. Civ. P. 60(b)(6).

Taken together, these three considerations established a uniquely powerful case for a Rule 60(b) application. The district court and the court of appeals recognized the strength of the case, but felt that only this Court could ultimately say whether the case was strong enough. It then remained for this Court to decide whether to review the denial of the 60(b) motions and, having granted the petitions for writs of certiorari, to decide whether the argument for overruling *Aguilar* is ultimately persuasive.[1] But the issue has been properly presented to the Court, and there is no reason for

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[1] The denial of a Rule 60(b) motion is subject to review under an abuse-of-discretion standard. *See, e.g., Brien v. Kullman Indus.*, 71 F.3d 1073, 1077 (2d Cir. 1995). That standard, however, requires reversal if the district court applied the wrong legal principles. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law."); *Koon v. United States*, 116 S. Ct. 2035, 2047-48 (1996) ("[A]n abuse of discretion standard does not mean a mistake of law is beyond appellate correction. . . . The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."). In this case, the district court was "guided by [the] erroneous legal conclusion[]" stated in *Aguilar*. *Id.* It is appropriate under the abuse-of-discretion standard for this Court to clarify the legal principles that should be applied and, if necessary, to remand the case for the district court to exercise its discretion under the correct legal principles. Alternatively, if, as petitioners contend, the correct legal principles leave no room for the exercise of discretion, the Court can reverse and remand with instructions to vacate the injunction.

the Court to leave the issue in the state of uncertainty in which it now rests.[2]

Respondents raise various institutional arguments as to why the Court should not consider overruling *Aguilar*. But those institutional arguments are unpersuasive in the unique circumstances of this case. The interests in finality and *stare decisis* counsel generally against granting a Rule 60(b) motion or overruling a precedent. But "[t]he principle of finality is not offended by modification which disturbs no accrued rights and concerns only future conduct." *Polites v. United States*, 364 U.S. 426, 440 (1960) (Brennan, J., dissenting). And the principles of finality and *stare decisis* are of reduced significance when, as in this case, a precedent has already been undermined by subsequent decisions and explicitly questioned by a majority of the Members of the Court.

Under these circumstances, the interest in "institutional integrity," which the respondents also invoke, warrants confronting the prior precedent head-on and clarifying whether it is in fact consistent with subsequent doctrinal developments. It advances no institutional interest for the

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[2] If an injunction is entered by the district court and never appealed, there would be no doubt that the district court could later grant relief from the judgment based on a showing that the governing legal principles had changed. *See* Rule 60(b)(5) (authorizing relief when it is "no longer equitable that the judgment should have prospective application"). There is no reason why the rule should be any different when the injunction was affirmed by, or entered at the direction of, an appellate court. It may ultimately be for the appellate court to decide whether the law had changed sufficiently to warrant overruling its prior decision, but that is no reason to conclude that the party whose case was decided at the appellate level should be barred from making the argument. And under *Standard Oil*, it is clear that the argument is properly directed in the first instance to the district court.

Court to issue decisions that undermine *Aguilar*, for a majority of the Justices to invite reconsideration of the decision, and for the Court then to turn a deaf ear to the affected parties who seek the reconsideration that has been invited.[3]

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[3] There is some suggestion in the Brief *Amici Curiae* of Council on Religious Liberty, et al. that *Helms v. Cody*, 856 F. Supp. 1102 (E.D. La. 1994), *appeal docketed sub nom. Helms v. Picard*, No. 97-30231 (5th Cir., Mar. 17, 1997), would be a better vehicle for reconsideration of *Aguilar* by this Court. The issue at this point, however, is not which case would be a better vehicle for reconsideration of *Aguilar*, but whether this case is a proper vehicle.

It bears noting, moreover, that the *amicus* brief touting the *Helms* case was filed on behalf of the plaintiffs in *Helms*, among others, and was authored by their counsel in the case—the same counsel who elected not to seek review in this Court in three other cases that would have presented an opportunity for this Court to revisit *Aguilar*. *See Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991). There is no reason to assume that the same counsel would seek to bring the *Helms* case to this Court.

Nor can the Court assume that it will ever have an opportunity to review *Committee for Public Education and Religious Liberty ["PEARL"] v. Secretary*, 942 F. Supp. 842 (E.D.N.Y. 1996), in which the court upheld post-*Aguilar* arrangements in New York City's Title I program. Respondents' counsel, who also represents the plaintiffs in *PEARL*, dismissed his appeal in *PEARL* without prejudice to its reinstatement within 30 days of the final determination of this Court in the present case. But even if the appeal were to be reinstated, respondents' counsel has already confirmed his hesitancy to bring any such case before this Court:

> [Petitioners] argue, and perhaps they are correct, that the parties in all of the aforementioned cases, including the *PEARL* case, who wish *Aguilar* to continue to be the law of the land have not and will not seek to bring a case before the Supreme Court at the present time and with the present membership in which the Court might explicitly overrule *Aguilar*. That, of course, is their right. They neither break nor bend any rule in not seeking certiorari.

In sum, the motions under Rule 60(b) were procedurally proper, and the Court should decide the issue that they present: does *Aguilar* any longer reflect the current understanding of the First Amendment's prohibition against an establishment of religion?

II. *AGUILAR* SHOULD BE OVERRULED

Respondents make no effort to defend the result in *Aguilar* on the ground upon which it was based—that providing Title I services on the premises of parochial schools gives rise to excessive entanglement of government and religion. In fact, respondents explicitly "eschew defending . . . the 'entanglement' prong" of *Lemon* and maintain that "reference to that doctrine is unnecessary" to decide this case. Br. Resp. 31, 43. *Aguilar's* rejection of on-premises Title services was correct, respondents contend, "as a prophylactic measure" to ensure that Title I teachers do not promote religion, or, alternatively, because on-premises Title I programs create a "symbolic union" between church and state and impermissibly subsidize the religious functions of the private schools. These arguments, however, do not support the result in *Aguilar* any more than does the notion of excessive entanglement upon which the Court relied.

A. Excessive Entanglement

Although respondents do not address the issue of excessive entanglement, several *amici* do. Significantly, however, a number of *amici* who identify themselves as supporting respondents in fact agree with petitioners that on-premises Title I programs need not involve excessive

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Reply Brief for Plaintiffs-Appellees-Cross-Appellants, Betty-Louise Felton, et al. in *Felton v. Secretary*, No. 96-6160 (2d Cir. 1996), at 10-11.

entanglement.[4] In their view, any Establishment Clause concerns are eliminated as long as (a) Title I personnel are selected, assigned, supervised and disciplined by public authorities on the same terms as other public school teachers and without regard to race, religion, sex or political affiliation; (b) the curriculum is controlled by public school authorities; (c) access to services is dependent on objective tests selected by public school authorities and not on any religious criteria; and (d) classrooms are wholly under public school control and free of religious symbols.[5] With the exception of the unrealistic requirement that classrooms be "wholly" under public school control,[6] these conditions were met prior to *Aguilar* and would presumably be met in any

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[4] *See* Brief *Amici Curiae* of the American Jewish Congress, et al. 15-20. This is a significant change in the position of several *amici* (including the American Jewish Congress, the National Educational Association, the Baptist Joint Committee on Public Affairs, and the Central Conference of American Rabbis) who argued in *Aguilar*: "The Use of Public School Teachers to Provide Instruction in Secular Skills on the Premises of a Religious School Constitutes a *Per se* Entanglement of Church and State in Violation of the Establishment Clause." *See* Brief for the American Civil Liberties Union, et al. in *Aguilar v. Felton*, Nos. 84-237, 84-238 & 84-239, at 23. It is a change in position as well for the Anti-Defamation League, which filed a separate brief in *Aguilar*. *See* Brief *Amicus Curiae* for the Anti-Defamation League of B'Nai Brith in Support of Appellees, *Aguilar v. Felton*, at 10-14. It can fairly be said that the change in position of these *amici* reflects their recognition of a significant shift in the law.

[5] Brief *Amici Curiae* of the American Jewish Congress, et al. 19.

[6] Obviously the parochial school must retain control over maintenance of the Title I classroom. And although the parochial schools typically set aside a classroom for the exclusive use of Title I teachers before *Aguilar*, JA 58, there is no apparent reason why the Title I classroom could not be used for some other purpose when Title I services are not being offered.

on-premises program in the future. See JA 39-42, 46-63, 505-07.[7]

Other *amici* continue to argue, however, that on-premises Title I programs will necessarily involve excessive entanglement of government and religion. Their arguments are notably lacking in specificity, however, leaving at least two questions unanswered: First, how is it that public supervision of a public employee, or routine administrative contacts between Title I teachers and school officials, amount to "excessive entanglement" when the teaching takes place on the premises of the school, but not when the teaching takes place in a van parked out front? The supervision is the same, and the administrative contacts are the same. In neither case does the church-related school assert any interest in having the Title I teacher teach religion, in neither case is there any realistic danger that the Title I teacher will do so, and in neither case does the supervision to ensure that the Title I teacher does not do so intrude into matters of religious significance to the school. Likewise, in neither case do the routine administrative contacts interfere with the school's religious mission.[8]

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[7] Respondents speculate that Catholic Title I teachers have been assigned to Catholic school students and that Jewish Title I teachers have been assigned to Hebrew Day school students. Br. Resp. 4. The evidence is to the contrary. Assignments are made without regard to religion. JA 48-49, 340, 642-43. And although the Board maintains no record of the religious affiliations of Title I teachers, the affidavits of Title I teachers demonstrate that the vast majority of them work in nonpublic schools with religious affiliations different from their own. JA 49-50.

[8] It is unnecessary in this case to define with precision the schools' religious mission, or to characterize the degree to which the schools are "pervasively sectarian," as this Court has used the term. *See, e.g., Hunt v. McNair*, 413 U.S. 734 (1973), *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). Respondents, however, have distorted the record and the

Second, what exactly are the *amici* concerned about when they speak of "excessive entanglement"? The only identifiable concern is that intrusive government involvement in religious affairs can inhibit religious freedom. That is a legitimate concern, but *amici* are confused in identifying it as an Establishment Clause concern. As noted in our main brief, "entanglement" of government and religion may reach the point that the government infringes the *free exercise* of religion, but "entanglement" is not a useful criterion for identifying when the government has *established* a religion.

The cases cited by *amici* confirm this understanding of the significance of "entanglement." *Amici*, for example, cite a series of cases holding that the courts may not involve themselves in matters of church discipline and governance. *See, e.g., Serbian East Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). When the Court in those cases warned against becoming "entangled in essentially religious controversies," *Serbian East Orthodox Diocese*, 426 U.S. at 709, it was vindicating the church's right to free exercise of religion, not the general prohibition against an establishment of religion. *See also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490

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contentions of the parties on these issues. Petitioners most assuredly do maintain that the Catholic schools in New York are *not* pervasively sectarian. The uncontroverted evidence is that (1) they do not restrict admissions or hiring on religious grounds and many (in some schools most) of their students are not Catholic; (2) they do not make an effort to compel their students to adopt or obey the teachings of Catholicism; and, most importantly, (3) they do not impose religious restrictions on the content of secular instruction. JA 660-61, 665, 685-86, 690. The record makes clear that the inner-city Catholic schools whose students receive Title I services do not exist "solely for narrow parochial or sectarian purposes"; their mission . . . is as much educational and social as it is religious." JA 672; *see also* JA 694-97.

(1979) (refusing to extend NLRB jurisdiction to church-operated schools because of potential for interference with church's First Amendment rights).

Amici also cite a series of cases in which the Court has upheld the application of a tax or other regulation to a religious organization. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990); *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). But again, the principal argument that was being advanced (and in these cases rejected) was an argument by the religious organization that enforcement of the tax or regulation burdened the free exercise of religion. To the extent that the religious organization also argued that there was entanglement amounting to an Establishment Clause violation, the Court's response in *Swaggart Ministries* was on the mark: the Establishment Clause's "core values are not even remotely called into question" by "neutral and nondiscriminatory" regulation. 493 U.S. at 394.[9]

These cases, in which religious organizations raised First Amendment objections to government interference in their affairs, underscore the critical point about so-called "entanglement" of government and religion: government intrusion into, or regulation of, church affairs can inhibit the church's religious freedom, but it does not "establish" religion in any sense of the word. Churches and religious organizations whose religious freedom has been inhibited by government regulation may claim that their free exercise

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[9] In *Hernandez*, the Church of Scientology raised a separate Establishment Clause objection—that allowing a tax deduction for "contributions," but denying a deduction for the price charged for its training sessions, created an "unconstitutional denominational preference." 490 U.S. at 695. That argument obviously had nothing to do with entanglement.

rights have been infringed, but nonadherents (like the plaintiffs here) have no standing to assert such a claim. And the Establishment Clause claim that they seem to assert is a contradiction in terms: regulations that interfere with someone else's religion cannot at the same time impermissibly endorse or promote or advance that religion.[10]

Nothing will be lost if the Court clarifies once and for all that "excessive entanglement" is not an Establishment Clause test. All of the cases discussed above would be unaffected, as would the remaining cases cited by the *amici*. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), did not rest on the notion of excessive entanglement that is at issue here. The evil in *Larkin* was that "important, discretionary governmental powers [were] delegated to . . . [a] religious institution[]." *Id.* at 127. That, according to the Court, (a) created a risk that governmental powers "could be employed for explicitly religious goals," (b) "provide[d] a significant symbolic benefit to religion in the minds of some," and (c) "create[d] the danger of '[p]olitical fragmentation and divisiveness on religious lines.'" *Id.* at 125-27 (citation omitted). There may be a question whether each of these considerations, standing alone, would be regarded as a

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[10] The relationship between government and religion, of course, may result in an Establishment Clause violation if religion is impermissibly subsidized or endorsed, or if participation in religious activity is coerced. Something more than "entangling" regulation is present when these results occur, however. And if none of these results is present, it is difficult to understand what Establishment Clause value is offended by the mere fact of administrative contact. *See* Brief for Petitioners Rachel Agostini, et al. 29-30.

sufficient basis for the result in *Larkin*,[11] but there is no reason to fear that repudiation of *Lemon's* entanglement prong would undermine the result in *Larkin*.[12]

Nor would repudiation of *Lemon's* entanglement prong necessarily alter the result in *Lemon* itself. In that case, the Court held that the states of Pennsylvania and Rhode Island could not pay or reimburse the salaries of parochial school teachers. That result is correct as long as the Establishment Clause is interpreted to prohibit direct aid to a religious institution—a proposition that these petitioners need not and do not question in this case. *See* Brief for Petitioners Rachel Agostini, et al. at 21-22.

In sum, clarification that excessive entanglement is not an Establishment Clause test, or even a useful device to identify potential Establishment Clause violations, will not alter the result in any case other than *Aguilar* and, perhaps, the portion of *Meek v. Pittenger*, 421 U.S. 349, 367-72 (1975), upon which *Aguilar* was explicitly based. It is precisely those results, of course, that petitioners maintain ought to be altered. The government does not interfere with religious liberty when it supervises its own remedial teachers, or when it engages in the routine administrative contacts that are necessary to coordinate a limited program of remedial instruction with parochial school officials. Parochial school officials have never complained that those administrative

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[11] Neither "symbolic union" nor political divisiveness has ever been regarded as an independent basis for finding an Establishment Clause violation. *See* page 15, *infra*; *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

[12] *Amici* also cite *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), but that case *rejected* an Establishment Clause challenge to Title VII's exemption of religious organizations. It did not *rely* upon any notion of entanglement to find an Establishment Clause violation.

features of Title I interfere with their religious mission, and respondents would have no standing to assert such a claim even if there were a basis for one.

B. Respondents' "Prophylactic" Argument

Respondents attempt to save *Aguilar* by recasting its rationale. The real determination in *Aguilar*, they suggest, is that there is "no sure way to prevent public employees on parochial school premises from supporting the religion or religious mission of those schools," and that a rule against on-premises services must, therefore, be adopted as a "prophylactic measure." Br. Resp. 42-43. *Aguilar* was not explained in those terms, however, and any such explanation would be untenable.

Prophylactic rules may be necessary when there is no other way to ensure protection of a constitutional right, and when the prophylactic rule itself does not impose a significant burden on the exercise of some other constitutional right. *Miranda* warnings can be justified as a prophylactic rule under this rationale, but a rule against on-premises Title I services cannot. It is simply unrealistic to suggest that the danger of public employees' injecting religion into secular Title I classes is so great that not even reasonable supervision is sufficient to guard against the danger. Surely some substantial experience of abuse is necessary before a harsh prophylactic rule is adopted to prevent abuse. And there has been no such experience under Title I. *See Aguilar*, 473 U.S. at 424, 428 (O'Connor, J., dissenting).

A prophylactic rule against on-premises Title I services is not only unnecessary; it is affirmatively damaging in human, economic and constitutional terms. Students are denied needed remedial services in the setting that is most convenient and effective. The government is forced to spend hundreds of millions of dollars to pay the additional costs of

educationally inferior arrangements. And parents are discouraged from selecting the religious schools they would prefer for their children—a selection that implicates their First Amendment right to free exercise of religion, as well as their constitutionally protected "liberty . . . to direct the upbringing and education of [their] children." *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

In this area and under these circumstances, a prophylactic rule has no place.

C. Symbolic Union

This Court has never invoked "symbolic union" as an independent ground for invalidating a government program or practice. Nor has it condemned any and all "symbolic union" of church and state. If it had, then the motto "In God We Trust" would have to be abolished from the nation's currency.

The question, the Court has stated, is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985). There is no such likelihood here. As demonstrated in our initial brief (at 24-26), there is simply no way any reasonable observer could perceive a program that provides on-premises Title I services to all eligible schoolchildren, regardless of their parents' individual religious choices, as endorsing or disapproving any of those religious choices.

D. Subsidization of Religious Functions

Respondents acknowledge, as they must, that Title I does not involve any "direct funding" of any religious enterprise. Br. Resp. 39. They appear to suggest that Title I provides

"direct grants" that subsidize parochial schools. *Id.* But Title I does not involve any "direct grants" to any school. Title I money flows from the federal government to the New York City Board of Education; no money goes to the schools.

What respondents apparently mean to suggest is that Title I might *indirectly* subsidize parochial schools by taking over programs previously offered by the parochial schools. They do not go so far as to assert such a claim, however, because there is no evidence to support one. Instead, respondents offer their "belie[f]" that Title I services have "supplanted" the schools' own remedial programs, and suggest that the record is inadequate to determine whether that is the case. But respondents cannot rely upon a mere "belief" at this stage of the proceedings, and it is too late for them to suggest that the record needs to be developed. Respondents had ample opportunity—twice—to develop the record on this point, and the record is clear.

The Superintendent of Education of the Roman Catholic Diocese of Brooklyn submitted an uncontroverted affidavit in 1979, in which he stated that the Catholic schools of the Diocese had not previously provided "any of the types of remedial educational services presently available under Title I," and that the schools would not be in a position "to provide the services on their own" if Title I services were no longer available. JA 665. Again in 1995, in support of the petitioners' Rule 60(b) motion, the Superintendent reiterated that the services provided under Title I "are supplemental to the general educational services provided by" the schools and "have not replaced any educational services that were previously offered by" the schools. JA 660. Officials of the Archdiocese of New York submitted similar affidavits in 1979 and again in 1995. JA 685-86, 690.

In short, the unambiguous and uncontroverted testimony of the knowledgeable school officials is that the Title I program in New York is in strict compliance with the statutory mandate that programs supplement, and not supplant, services available from other sources. 20 U.S.C. § 6322(b); 34 C.F.R. 200.12(a) (1966). Respondents had the opportunity to question this testimony, but chose not to do so.[13]

There is thus no evidence that Title I has relieved any school of the burden of providing any secular instruction that was previously offered, much less that Title I "in effect subsidize[s] the *religious functions* of the parochial schools by taking over a *substantial portion of their responsibility for teaching secular subjects*." *Grand Rapids*, 473 U.S. at 397, *quoted in Zobrest*, 509 U.S. at 12 (emphasis added). Title I services are limited in scope, and they are available only to those children who meet the strict requirements of educational and economic deprivation. Given the extremely limited nature and scope of Title I, it cannot be said that Title I takes over "a substantial portion of [the schools'] responsibility for teaching secular subjects." *Id.* For that reason, Title I services could be provided without offending

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[13] Respondents are silent as to why they chose not to contest this testimony in the original proceeding in the district court. They claim that they had no opportunity to argue the "merits" of the constitutional issues on the Rule 60(b) motions, Br. Resp. 42, but that is simply not so. Respondents' observation that they "would not have risen to the bait" in any event, given their position that the Rule 60(b) motions were procedurally infirm, is more telling. *Id.* The fact is that respondents vigorously contested other facts below and they were never denied the opportunity to argue and submit evidence that Title I services supplanted services that were otherwise available in the parochial schools. And, of course, if there were such evidence, there would be no need to invoke the Establishment Clause, which may or may not be violated as a result; such evidence would establish a clear violation of the statute.

the Establishment Clause even if they did replace remedial services previously offered by a particular school. The fact that they do not replace any such services eliminates any argument whatsoever that Title I indirectly subsidizes religious activity by taking over a substantial portion of the schools' secular instruction.

Respondents themselves implicitly recognize that Title I does not impermissibly subsidize religious activity. For if it did, the problem would not be cured by moving Title I off-premises: Title I services could not be offered to parochial children at all. But not even respondents contend that Title I services must be denied to these students altogether. These services are purely secular, limited in scope, and available only to those few who meet the statutory criteria of educational and economic deprivation. They do not replace any services offered by the parochial schools. They do not, therefore, subsidize religious activity even indirectly.

CONCLUSION

Aguilar should be overruled. The judgment of the court of appeals should be reversed, and the case remanded with instructions to vacate the injunction.

Respectfully submitted,

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Nos. 96-552 and 553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

– No. 96-552 –

RACHEL AGOSTINI, ET AL.,

Petitioners,

vs.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

(For Continuation of Caption, See Reverse Side of Cover)

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS CHANCELLOR AND BOARD OF EDUCATION OF THE CITY OF NEW YORK

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– No. 96-553 –

CHANCELLOR OF THE BOARD OF EDUCATION
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Respondents

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Nos. 96-552 and 553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

– No. 96-552 –

RACHEL AGOSTINI, ET AL.,

Petitioners,

vs.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

– No. 96-553 –

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET ANO.,

Petitioners,

vs.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS CHANCELLOR AND BOARD OF EDUCATION OF THE CITY OF NEW YORK

ARGUMENT

POINT I

RESPONDENTS AND THEIR SUPPORTING AMICI FAIL TO SHOW THAT THE ESTABLISHMENT CLAUSE IS VIOLATED BY A TITLE I PROGRAM THAT SERVES PAROCHIAL SCHOOL STUDENTS ON THE SITE OF THEIR SCHOOLS.

Respondents request that this Court reaffirm the holding of *Aguilar v. Felton*, 473 U.S. 403 (1985), but claim to abandon any reliance on the excessive entanglement prong of the so-called "Lemon" test, which was the sole doctrinal basis of the finding of unconstitutionality in *Aguilar*. Resp. Br., pp. 31, 36-37, 46; *Aguilar v. Felton*, 473 U.S. at 409-414. The theories now tendered by the Respondents were adopted by only a single member of the five-member majority in *Aguilar* (473 U.S. at 417-418; Powell, J., concurring), and Respondents support these theories with a portrait of the on-site program as being totally integrated with the parochial school's faculty and curriculum. This factual scenario is unsupported by the record, as are the Respondents' legal theories.

A. Respondents' Description of the pre-*Aguilar* program in New York City and other factual representations in their brief, mischaracterize the record.

We would first note that we do not dispute that virtually all the students served by the Board's non-public school program attend religiously affiliated schools. JA606. This does not mean, however, that the Title I program, either in New York City or the nation as a whole, does not serve a "broad class of citizens defined without reference to religion." Resp. Br., p. 2, quoting from Agostino Br., p. 16. This merely reflects the reality that in New York City, Title I-eligible children tend to be found in either public schools or religiously-affiliated private schools, not in non-denominational private schools. In a Title I program such as Petitioners' which serves a total of

approximately 260,000 students of which almost 240,000 are public school students, it is clear that a broad class of students are being served without regard to religion. JA606.

Turning to Respondents' description of the on-site program, the Board was then unable to provide Title I services if there were too small a number of students to make assignment of a Board professional feasible. JA43.[1] While that circumstance appears to provide no support for any of Respondents' legal arguments, in any event new technology now enables the Board to provide Title I services by computer, even to individual students. JA327-328, JA633, JA637. Fiscal constraints, however, preclude providing Title I services to all eligible students. And, while the principals of the parochial schools were necessarily involved in the identification of Title I-eligible students, eligibility was and is determined on the basis of objective criteria, including surveys submitted to all non-public schools within the City. JA39-42, JA60-61. As for Respondents' claim that selection of students "was in major part determined by the teachers and principal of the [parochial] school," Resp. Br., p. 3, the record shows that while the Title I teachers and other professionals might consult with the parochial school teachers and administrators on the educational needs of Title I-eligible students, the selection of individual students for participation in a program was made solely by the Title I professional, and generally on the basis of standardized tests. JA50-51. While the Title I professionals may have considered the recommendations of the parochial school professionals, JA239, JA242, JA240, the decision was solely that of the Title I professional. JA50-51.

Respondents assert that the Title I professionals were assigned to parochial schools on a voluntary basis, and infer that this enabled Catholic teachers to volunteer to serve at Catholic schools, and Jewish professionals at Hebrew schools. Resp. Br., pp. 3-4. Assignment to the nonpublic school program was voluntary only in the sense that if a Board teacher

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[1] Numerical references preceded by "JA" are to the Joint Appendix.

declined to work in a nonpublic school setting, he or she might refuse an appointment and would revert to an eligibility list. JA48. The selection of the particular school at which the Title I teacher would be assigned was determined solely by the administrator of the Board's Title I program based upon eligible lists and seniority. JA46-48. There is no evidence that Title I professionals were able to manipulate the process to insure that they would teach at a school affiliated with their religion. Indeed, the record evidence indicates that under the on-site program, most teachers taught at schools with a different religious affiliation than their own. JA49-50. The proof further shows that under the present, post-*Aguilar* program, at least 60% of the Title I professional staff is of a religious affiliation different from one or more of the nonpublic schools whose students they serve. JA643.

As for the relationship of the Title I professionals with their parochial school counterparts, it is clear that they consulted and coordinated with the parochial school professionals. Such coordination and consultation is not only necessary as a matter of good pedagogy, it is required by Title I. 20 U.S.C. §§ 6315(c)(1)(C), (E), 6321(b). However, the Title I professionals were instructed not to engage in team-teaching or other cooperative instructional activities with parochial school staff, and there is a binding finding of fact in this case that the Board's Title I professionals scrupulously followed those instructions. JA287-288; see decision of three-judge court in *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F.Supp. 1248, 1267-68 (S.D.N.Y.), *app. dsmd sub nom National Coalition for Public Education v. Hofstedler*, 449 U.S. 805 (hereinafter, "Pearl") (1980). The use of a "team approach" by guidance counsellors or psychologists was obviously a form of consultation. JA212, JA250.

Respondents' argument that under the Title I on-premises program, the Title I professionals were as much a part of the faculty as parochial school teachers, is an argument that Respondents tendered on the prior appeal to this Court, and the briefs of the other parties established that this portrait of the

program had no basis in the record. The assertion, besides being factually unsupported, is inconsistent with the factual findings made in *Pearl*, which are binding on the parties in this case, *Pearl*, *supra*, at 1267; JA287-288. Respondents' scenario was rejected in at least one of the dissenting opinions in *Aguilar* (473 U.S. at 424 [O'Connor, dissenting]), and had the majority adopted Respondents' radical view of the program, the Court in all likelihood would have struck the program down on "effect" grounds. *See*, *Grand Rapids School District v. Ball*, 473 U.S. 373, 386-392 (1985).

The record in this case confirms that, since *Aguilar*, the Board's Title I professionals remain independent of the parochial school faculty. JA643, JA647. It is the Board's staff which determines the content and methodology of the instructional and clinical services provided; the nonpublic school staff cannot dictate the content of, or the methodology used to provide those services. JA647. The Board continues to issue instructions to its professionals to maintain the secular nature of the program, and violation of such directives have rarely, if ever, occurred. JA643-644. As under the pre-*Aguilar* program, the great majority of the Board's Title I professionals provide services at more than one parochial school. JA643. The Board's program continues its "unblemished record" of assuring the secular nature of its Title I program. 473 U.S. at 424-425 (O'Connor, dissenting).

Indeed, in their amicus brief to the Court, the American Jewish Congress suggests that an on-site Title I program would be constitutional, provided the program contained certain protections. They are essentially: full public control over selection and discipline of personnel; full public control over curriculum; access to the program based on objective, nonreligious criteria; and public control of Title I facilities, including the removal of religious symbols. Brief Amici Curiae of American Jewish Congress, *et al.*, p. 19. Under Petitioners' pre-*Aguilar* program, the professionals were fully under the control of, and assigned by, the Board's own Title I administrators. JA44-50. The Board and its employees devised the Title I program and it was administered solely by its

professionals. JA44-46, JA50-55. Teachers were appointed without regard to religious affiliation JA48. Access to the program was determined by non-religious, objective criteria, including the use of surveys, statistics and test results. JA40-44. None of the rooms used for Title I instruction contained any religious symbols, and, in effect, were "a public school within the nonpublic school." JA59. The present program has not changed in any significant manner, and remains secular. JA606-607, JA643-646. Should the Court permit the Petitioners to resume an on-premises program, we shall again assure that classrooms will be cleared of all religious artifacts during Title I instruction, and that personnel, selection of students and curricula will be determined by Board personnel, as has been done for the past thirty years. JA342, JA643-646.

Respondents' cavalier treatment of the facts also infects their discussion of aspects of the post-*Aguilar* program in New York. While Title I, non-public school enrollment decreased drastically after the *Aguilar* decision, there is no evidence that the principals of the parochial schools exercised a veto power over their students' participation at public school sites. Rather, the principals were objecting to the loss of instructional time and expressing concerns for safety from criminal activities and traffic; the principals were obviously articulating the concerns of the students' parents. JA317. Furthermore, what Respondents do not state is that because of subsequent overcrowding in the public schools, the public schools are a dwindling source of space for non-public school Title I students. JA374-464, JA713.

Respondents' description of the administrative and financial burdens of complying with *Aguilar* contain similar misstatements. The MIU's are generally not parked directly in front of the school entrance, but are parked on the same block or around the corner; they are never parked on private school property. JA627. Respondents claim that the time to go to and from an MIU would consume no more than a normal ten-minute recess between classes. Resp. Br., p. 10. However, most nonpublic school students receiving Title I services are in the elementary school grades where there are no regular

class changes or recess between classes. JA721. Thus what Respondents treat as recess is actually instructional time, which is lost in travelling to and from public school sites, leased sites and MIU's. JA330, JA721.

Finally, Respondents purport to establish that the financial burdens from the post-*Aguilar* program are exaggerated, selectively quoting from certain language in a memorandum of law submitted by the Petitioners in another litigation in which Respondents' counsel, as lead counsel, sought unsuccessfully to have the present, off-site program declared unconstitutional. Resp. Br., pp. 10-11; *see, Committee for Pub. Educ. & Religious Liberty v. U.S. Dept. of Educ.*, 942 F.Supp. 842 (E.D.N.Y. 1996) (hereinafter, "Pearl II").[2] In that case, Plaintiffs urged that the Petitioners were violating the Establishment Clause by financially favoring parochial over public school students. The cited language, a response to a legal argument predicated upon a statistical analysis, was merely an attempt to show that the cost of complying with *Aguilar* was proportionately a small part of the entire Title I program in New York City. It was by no means a concession that the fiscal impact of complying with *Aguilar* was not substantial.

B. Respondents have not shown that the Petitioners' Title I program results in a direct subsidy to the parochial schools or that the program in any other way violates the Establishment Clause.

Respondents assert three theories by which the Board's program violates the Establishment Clause. Two need no extensive response. The "symbolic union" is necessarily related to Respondent's perception of the program, which we have shown to be both exaggerated and incorrect. Whatever the appropriateness of applying the "symbolic union" analysis under some different program (*see*, *Grand Rapids School*

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[2] The Plaintiffs' appeal to the Court of Appeals in Pearl II has been withdrawn, without prejudice, pending resolution of this case.

District v. Ball, *supra*, 473 U.S. at 389-392), Justice O'Connor supplied the appropriate response to Respondents:

> New York City's public Title I instructors are professional educators who can and do follow instructions not to inculcate religion in their classes. They are unlikely to be influenced by the sectarian nature of the parochial schools where they teach, not only because they are carefully supervised by public officials, but also because the vast majority of them visit several different schools each week and are not of the same religion as their parochial students. In light of the ample record, an objective observer of the implementation of the Title I program in New York City would hardly view it as endorsing the tenets of the participating parochial schools. To the contrary, the actual and perceived effect of the program is precisely the effect intended by Congress: impoverished schoolchildren are being helped to overcome learning deficits, improving their test scores, and receiving a significant boost in their struggle to obtain both a thorough education and the opportunities that flow from it.

473 U.S. at 425 (footnote omitted).

For the same reasons, Respondents' "prophylactic" argument, also premised on a mistaken view of the record, must be rejected. As Justice O'Connor also explained in her dissent, in a section joined by the Chief Justice, experience has rebutted the Court's assumption that professional, publicly-employed educators would begin to inculcate religion once allowed to enter the premises of parochial schools. *Id.*, p. 427, criticizing part V of *Meek v. Pittenger*, 421 U.S. 349, 367-373 (1975). The record of this case is part of that "experience" and establishes that an on-premises program should not be forbidden based on speculation totally at odds with that record.

Finally, the on-premises program did not, and if reinstated, would not result in a direct subsidy to the parochial schools. We first note that some of the amici have misread our

position. Petitioners Chancellor and Board of Education have not urged that the principle of neutrality may support a direct subsidy to parochial schools. Rather, our position is that under Title I, and specifically under the Board's program, the direct benefit is to the child, and is made without regard to his or her religious affiliation. Brief for Petitioners Chancellor and Board of Education, pp. 29-30. Any benefit to the parochial school is not direct but attenuated. Id., p. 30. Furthermore, while Respondents do not attack Title I itself or the services provided, but only their on-site provision, any benefit to the parochial schools is traceable to the services, whether provided on or off the premises of the parochial schools. Resp. Br., p. 1.

The "benefit" to the parochial schools flowing from the Title I aid to the student is no more direct than the benefit to the parochial school in *Zobrest v. Catalina Foothills Sch. District*, 509 U.S. 1 (1993) or the Christian college in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); certainly those schools benefited as much from the availability of a sign-language interpreter for a deaf student (*Zobrest*), and from vocational rehabilitation services for a blind student (*Witters*) as any parochial school would benefit from remedial educational services for its Title I-eligible students. The fact that a larger number of students may be receiving benefits is not determinative or change the analysis. This Court has upheld programs providing aid to large numbers of students, including parochial school students, where the benefit to the parochial school is not direct. *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) (transportation reimbursement); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (loan of textbooks).

Respondents' assert that the Board is "supplanting" the regular curriculum by allowing the parochial schools to concentrate on other students and relieving them of the duty to provide the remediation. Resp. Br., pp. 6, 42. However, if a parochial school were to cease providing remediation it had provided in the past, it would be in violation of the Secretary's regulation. 34 C.F.R. 200.12(a) (1996). Furthermore,

the evidence in the record shows that the parochial schools are not financially able to provide such remedial services and did not provide them in the past. JA660-661; JA685-686. As for the ability to "proceed with the instruction of the rest of the class" Resp. Br., p. 6, the Title I services are intended to supplement and reinforce the regular classroom instruction, not supplant it. JA331. Thus, for example, a student is not removed from a regular mathematics class to receive remedial mathematics. JA621.

The cases on which Respondents and amici place greatest reliance are clearly distinguishable. In *Grand Rapids School Dist. v. Ball*, *supra*, 473 U.S. 373 (1985) the record contained evidence of the kind of subsidization of the parochial schools not present here. In particular, the Community Education program operated like an adjunct of the parochial school, with the courses taught by instructors who were full-time employees of the parochial schools. 473 U.S. at 399 (O'Connor, concurring in part, dissenting in part). As for *Meek v. Pittenger*, *supra*, 421 U.S. 349, the "auxiliary services," including remedial services, were merely a part of an overall plan obviously intended to aid parochial schools. *Id.*, p. 352-355. The programs in these cases, as in *Lemon v. Kurtzman*, 403 U.S. 602 (1970) were all state programs intended to give financial assistance to parochial schools. Under the circumstances, those programs, unlike Title I, could be described as involving direct subsidies to the parochial schools. *Zobrest v. Catalina Foothills School District*, *supra*, 509 U.S. 1, 12 (1993).

Respondents finally complain that they should be allowed further inquiry into the operation of the Board's program. Resp. Br., p. 42. However, in Pearl II, in which the present, post-*Aguilar* program was upheld, the District Court explicitly found that the parochial schools would not have provided the remedial services on their own. 942 F.Supp. at 866. Furthermore, in Pearl II, Respondent's counsel had an opportunity to obtain disclosure from all parties to this action, and did obtain extensive discovery as to the operations of the Board's program. JA605. The facts as to the Petitioners' program have

been fully developed and considered in this case, in Pearl and in Pearl II. There is no need for further discovery or any further inquiry into the facts.

POINT II

RESPONDENTS AND THEIR SUPPORTING AMICI FAIL TO SHOW ANY CONVINCING REASON WHY THE COURT SHOULD NOT RECONSIDER *AGUILAR* ON PETITIONERS' RULE 60(B) MOTION.

The central theme underlying the Respondents' Rule 60(b) argument is that consideration of the merits on our motion will encourage obstinate litigants in other cases to seek to return to this Court and overturn a prior decision. Resp. Br., p. 23; see also, Brief Amicus Curiae of Americans United for Separation of Church and State, et al., p. 6. However, this case does not involve the resolution of some commercial or other private dispute which must be given finality. It involves not only the Board of Education but the Secretary of Education with responsibility for a national federal program, and a continuing permanent injunction. We rely not on some isolated dicta but on the clear statements of a majority of the Court calling for reconsideration of *Aguilar*. Thus consideration of whether *Aguilar* should be overruled does not threaten judicial stability. Any frivolous 60(b) application can be easily and effectively dealt with by the district court. *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 19 (1976). The only question is whether it should be decided here or in some other case, and Respondents and their supporting amici present no convincing basis for delaying resolution of an issue that affects a nation-wide program, while the Court awaits such a case. Indeed, Respondents and the amici fail to cite any case which might raise the *Aguilar* issue for this Court in the context of a Title I program. The Court should reach the merits.

CONCLUSION

THE ORDER OF THE COURT OF APPEALS SHOULD BE REVERSED SO AS TO GRANT THE PETITIONERS' RULE 60(B) MOTION AND VACATE THE INJUNCTION.

Respectfully submitted,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF EDUCATION

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REPLY BRIEF FOR THE SECRETARY OF EDUCATION

1. Respondents argue that petitioners' motion under Federal Rule of Civil Procedure 60(b) cannot be used as a vehicle to grant petitioners relief from the injunction entered by the district court in this case because *Aguilar* v. *Felton*, 473 U.S. 402 (1985), has never been overruled by this Court, and because the separate opinions joined by five Justices in *Board of*

Education of Kiryas Joel Village School District v. *Grumet*, 512 U.S. 687 (1994), do not constitute a "change in the law" that would warrant relief from the judgment. Resp. Br. 16-19. We agree that *Aguilar* has not been overruled, and that *Kiryas Joel* itself was not a "change in the law" warranting a grant of relief from the injunction by the district court; the lower courts were obliged to deny relief from the injunction, since they were bound, under the doctrine of *stare decisis*, by this Court's directly controlling precedent in *Aguilar*. But while those points confirm that the lower courts below could not depart from *Aguilar*, they do not answer the question whether *this* Court may overrule its decision on review of the denial of petitioners' Rule 60(b) motion.

The relevant doctrinal constraints on this Court's reconsideration and overruling of its earlier decision —and indeed the constraints on any federal court of appeals that might similarly be asked in the future to reconsider a ruling that provides the legal basis of a permanent injunction with prospective effect—are found not in Rule 60(b) but rather in *stare decisis* and law of the case. Assume, for example, that a district court enters a permanent injunction against the enforcement of a statute based on directly controlling court of appeals precedent in its circuit, and also denies a Rule 60(b) motion based on the same precedent, and that the denial of the Rule 60(b) motion is then appealed. Assume further that, during that appeal, this Court, or the court of appeals en banc, rules in a different case that the statute (or a closely similar one) is constitutional and may be validly enforced. The court of appeals reviewing the district court's denial of relief under Rule 60(b) would surely be authorized to vacate the injunction, even though

the district court's denial of the Rule 60(b) motion was proper and not an "abuse of discretion" at the time the motion was denied.[1]

Amici suggest that another school district or the Secretary of Education might have sought relief from judgment in some other case that is directly controlled by *Aguilar* but was not litigated all the way to this Court. See Council on Religious Freedom, *et al.*, Br. 28-30. Even if that is true, that should not prevent New York City from invoking Rule 60(b) to seek and obtain relief on its own behalf in this case. In another case that was litigated to final judgment or settled by a consent decree, but was not litigated to this Court, the parties would also have to invoke Rule 60(b) to seek relief from the judgment; in those cases as well the lower courts would be bound by *Aguilar* and forbidden to grant relief until and unless this Court had overruled *Aguilar*.[2]

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[1] Similarly, a court of appeals reviewing the grant or denial of a preliminary injunction may decide *de novo* the controlling legal issues in the case, even though the general standard of review of grants and denials of preliminary injunctions is "abuse of discretion." This Court has observed that the usual "abuse of discretion" standard of appellate review in such cases is only "a rule of orderly judicial administration, not a limit on judicial power." *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986). Cf. *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978) (plurality opinion), *id.* at 16 (Stewart, J., concurring in judgment) (reversing grant of preliminary injunction based on rejection of lower courts' interpretation of First Amendment).

[2] Respondents argue (Br. 19-20 n.5) that Rule 60(b)(6) cannot be a vehicle for relief from judgment in this case, because (they maintain) Rule 60(b)(5) limits the courts' authority to granting relief from judgment based on changes in the law that have *already* occurred, and thereby exhausts the courts'

A motion for relief under Rule 60(b) is therefore an appropriate vehicle for this Court to reconsider its earlier decision in this case. Whether the Court should overrule that decision turns on the doctrines of *stare decisis* and law of the case. Concerning *stare decisis*, when this Court has in the past reconsidered a decision, the Court has examined that decision's conformity with the general thrust of the Court's jurisprudence in the same area. Thus, last Term, when the Court reconsidered and overruled *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), the

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power to grant relief based on any change in the law, past or anticipated. Rule 60(b)(5), however, authorizes the courts to grant relief from judgment when "it is no longer equitable that the judgment should have prospective application," and this Court has the authority to determine that the correct legal principles no longer make an injunction equitable. Cf. *Thornburgh*, *supra*. Alternatively, even if plaintiffs are correct about the requisite procedural sequence, the Court could overrule *Aguilar* and declare the correct rule of law on review of the denial of a Rule 60(b) motion—namely, that the Establishment Clause does not flatly prohibit public school teachers from delivering remedial education services inside religious school buildings—and, rather than order vacatur of the injunction outright, remand the case to the district courts for further proceedings on petitioners' Rule 60(b) motion, including the taking of any additional evidence by respondents on the question whether the provision of Title I services in religious schools under a particular plan to be implemented by New York City is unconstitutional, albeit in light of this Court's declaration that *Aguilar* is no longer good law. Cf. *Bowen* v. *Kendrick*, 487 U.S. 589, 620 (1988) (upholding statute on its face but remanding for as-applied constitutional challenge). On remand, the district court would then have the authority to conclude that there had been a change in the law, and to vacate the injunction insofar as it prohibits the City from implementing *any* plan for providing Title I services inside religious school buildings.

Court concluded that the rationale of the principal opinion in *Union Gas* had "deviated sharply from [the Court's] established federalism jurisprudence," and that decisions subsequent to *Union Gas* had shown that case to be a "solitary departure from established law," *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1127-1128 (1996). Similar considerations are present here: *Aguilar* was a significant departure from most of the Court's earlier entanglement decisions, and the Court's decisions after *Aguilar* returned to a more practical and restrained approach to the issue of entanglement. Most significantly, the Court's decision in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), which involved direct financial aid to religiously affiliated institutions, concluded that no danger of undue entanglement had been shown to be inherent in the Adolescent Family Life Act, 42 U.S.C. 300z *et seq.* Thus, the continuing vitality of *Aguilar* should be measured, not just by the separate opinions in *Kiryas Joel* (which explicitly stated that *Aguilar* should be reexamined), but also by full decisions of the Court such as *Kendrick*.

Concerning law of the case, respondents note correctly that appellate courts will generally not entertain legal arguments by losing parties that have been rejected in earlier stages of the litigation. Resp. Br. 22-23 (discussing, *inter alia*, *Illinois* v. *Illinois Cent. R.R.*, 184 U.S. 77 (1902)). But as we have noted in our opening brief (at 42-44), that policy is not based in doctrinal principles of finality of judgments—to which Rule 60(b) is a well recognized exception—but rather in the more flexible jurisprudential rules of law of the case and the "mandate rule" requiring inferior courts to obey the mandates of appellate courts. See *Illinois Cent. R.R*, 184 U.S. at 91. There

is no doubt that, under the law of the case doctrine, this Court has the *power* to reconsider its own earlier decision in the same case. See Gov't Br. 42-43.[3]

The substantial constraints imposed by the doctrines of *stare decisis* and law of the case are sufficient to avert the negative consequences to the courts put forward by respondents as the result of revisiting the *Aguilar* decision in this case (Resp. Br. 23-27). The occasions on which appellate courts reconsider their earlier decisions—whether or not in the same litigation—are few, and will not be

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[3] Respondents argue that appellate courts refuse to consider the substance of an underlying judgment when reviewing the denial of a Rule 60(b) motion for abuse of discretion. See Resp. Br. 23 n.8. The cases cited by respondents (*ibid.*), however, did not involve requests for relief from a permanent injunction with prospective effect, and are therefore of little relevance to this case. Respondents also rely on cases stating that courts of appeals will not consider requests to "reinterpret[]" the law when considering requests for modification of consent decrees presented under Rule 60(b). See Resp. Br. 22 n.7 (discussing *Fortin* v. *Commissioner of Mass. Dep't of Public Welfare*, 692 F.2d 790 (1st Cir. 1982)); see also *Coalition of Black Leadership* v. *Cianci*, 570 F.2d 12 (1st Cir. 1978). Those cases, however, were decided before *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), which clarified the standard for modification of a consent decree. Further, requests for modification of consent decrees may present different considerations than do cases like this one, involving injunctions entered after final judgment, since a party entering into a consent decree necessarily compromises some of its entitlement to a declaration of its legal rights and obligations. See *id.* at 389-390. Parties who litigate a case to judgment "know that the prospective effect of such a judgment or decree will be open to modification where deemed equitable under Rule 60(b)." *Id.* at 383.

materially increased by the use of Rule 60(b) in this context to grant relief from a permanent injunction. When, as in this case, a decision of this Court is directly controlling, the lower courts will be bound to adhere to that decision, whether the issue arises in the same case in which this Court previously ruled or in another case. In either situation, this Court, in exercising its certiorari jurisdiction, can readily determine whether the argument for reconsideration of the earlier decision is sufficiently meritorious to warrant a grant of review. The courts of appeals, in deciding whether to reconsider their earlier decisions en banc, employ similar considerations. See Fed. R. App. P. 35(a). Thus, when any appellate court is asked to reconsider its earlier precedent, the policies of *stare decisis* and law of the case provide sufficient guidance to ensure that decisions are not lightly overturned.

2. Respondents offer three reasons why the provision of public remedial education services inside religious school buildings violates the Establishment Clause: first, such a program creates a "symbolic union of church and state" in education (Resp. Br. 37-38); second, the program subsidizes the religious functions of the religious school (*id.* at 39-42); and third, there is "no sure way" to prevent public employees on religious school grounds from supporting the religious mission of the private schools (*id.* at 42-45). Those submissions are incorrect.

a. Respondents perceive a danger of symbolic union of church and state in the fact that public and religious school teachers "pace the same halls, use classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools." Resp. Br. 37-38. They equate

secular public instruction in religious schools with the religious instruction in public schools held invalid in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), contending that both create a danger of "fusion of governmental and religious functions." And they implicitly suggest that the danger of symbolic union is absent under the post-*Aguilar* Title I regime because public school teachers do not cross a doctrinal fence that *Aguilar* places around religious schools.

Although the location of an activity is relevant to the Establishment Clause inquiry into whether there is a "symbolic union of church and state," it is not the controlling factor. A "flat rule" turning on the location of the activity, "smacking of antiquated notions of 'taint,' would indeed exalt form over substance." *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1, 13 (1993). Rather, when religious activity takes place on public property (or *vice versa*), the crucial question is whether, on all the facts, there is a realistic danger that the objective observer would conclude that the government is endorsing religion. See *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 395 (1993); *Widmar* v. *Vincent*, 454 U.S. 263, 271-272 (1981); see also *Capitol Square Review & Advisory Bd.* v. *Pinette*, 115 S. Ct. 2440, 2453-2454 (1995) (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2459-2460 (Souter, J., concurring in part and concurring in the judgment); *Board of Education* v. *Mergens*, 496 U.S. 226, 250-252 (1990) (plurality opinion); *id.* at 264-270 (Marshall, J., concurring in the judgment).[4]

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[4] Thus, in *Widmar*, the Court stressed that the university had made a forum available to a broad array of groups and would not be perceived as endorsing views expressed in that

In the context of Title I services offered in New York, there is little danger of the symbolic union that respondents posit. The majority in *Aguilar* notably did not rest its decision on any conclusion that New York operated Title I as a "symbolic union of government and religion in one sectarian enterprise" (see Resp. Br. 38), and we believe that, "[i]n light of the ample record, the objective observer of the implementation of the Title I program in New York City would hardly view it as endorsing the tenets of the participating parochial schools." *Aguilar*, 473 U.S. at 425 (O'Connor, J., dissenting). Unlike the programs challenged in *School District of the City of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985)—which involved public programs offered and available to *all* students at a religious school and woven into the school day of the "typical nonpublic school student," *id.* at 375—Title I services are available only to certain students, in low-income areas and at risk of failing state performance standards, and therefore needing remedial services.[5] Even the impressionable child in

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forum, religious or otherwise. 454 U.S. at 271-272 n.10. In *McCollum*, by contrast, the school made its facilities available for use by religious instructors, but not others. The Court noted in *Widmar* that, in cases like *McCollum*, "the school may appear to sponsor the views of the speaker." *Ibid.*

[5] Respondents point out that, in *Ball*, the Court cited Judge Friendly's description of the program at issue in *Aguilar* as a "symbolic union" and "joint enterprise" of government and religion. See Resp. Br. 37-38 (quoting 473 U.S. at 392). This Court did not, however, approve Judge Friendly's description with respect to the facts of the *Aguilar* case itself, but rather with respect to the programs challenged in *Ball*, which involved significantly closer cooperation between public and religious school authorities and integration of their programs.

his or her formative years (see *id.* at 390) would not perceive that remedial instruction as state sponsorship of the religious mission of the private school.

Moreover, the supplementary services provided under Title I are available equally to students in public and private schools, and in practice overwhelmingly benefit public school students. See *Committee for Public Educ. & Religious Liberty* v. *Secretary, United States Dep't of Educ.*, 942 F. Supp. 842, 848 n. 2 (E.D.N.Y. 1996); United States Dep't of Education, *Mapping Out The National Assessment Of Title I: The Interim Report* 16 (1996) (lodged with the Clerk); United States Dep't of Education, *State Chapter 1 Participation and Achievement Information—1993-94*, at 20 (1996) (lodged with the Clerk). There is, accordingly, little danger that Title I would be perceived by the public at large as sponsoring or advancing the religious mission of the religious schools attended by a small minority of the Title I students.

b. Respondents argue that the pre-*Aguilar* Title I program in New York impermissibly subsidized the religious functions of the participating parochial schools. That argument is based in large part on a mistaken description of the program in operation. It also fails to take account of the important safeguards in Title I against use of public funds and teachers to advance religion.

According to respondents, Title I services offered to religious school students in New York were effectively under the control of the religious school because (they contend) religious school students were ineligible to receive Title I services at all if it was impracticable for the Board of Education to send a teacher to their school. Resp. Br. 3, 38-39. The

Secretary's current policy guidance on Title I makes clear, however, that the statutory requirement that students in nonpublic schools be provided services on an "equitable" basis, 20 U.S.C. 6321(a), "applies regardless of the number of children attending a private school." Gov't Br. App. 3a. Thus, when the number of eligible children attending a private school is too small to make it cost-effective to assign those students a teacher, the students may receive Title I services through other means, such as computer-aided instruction. *Ibid.* [6]

Nor is it the case that selection of students for participation in Title I services is controlled by religious school authorities, as respondents suggest (Resp. Br. 3). Title I teachers may and do *consult* students' teachers and principals in selecting students for participation in Title I and in devising programs appropriate to meeting the educational needs of the selected students. That consultation, however, is surely appropriate and necessary to the success of any public-supported remedial program for nonpublic school students. For example, even if a student is statutorily eligible for receipt of Title I

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[6] Respondents also argue that religious schools effectively have a veto over their students' eligibility for Title I services, since "no benefits can be delivered unless their school authorities elect to join a particular program." Resp. Br. 38-39 n.14. Although the Secretary's regulations and policy guidance do not directly address the point, the Secretary reads Title I's requirement of "equitable" services for nonpublic school students to provide that such students would still be entitled to receive Title I services if their parents wanted them to participate in the program, even if the religious schools declined to cooperate, and that local education authorities would be obligated to devise some mechanism for providing such religious school students with "equitable" services.

services, in that the student is failing or at risk of failing state performance standards based on "educationally related, objective criteria" (20 U.S.C. 6315(b)), consultation may make clear that the student's performance problems are aberrational, and that the Title I resources would be better directed towards another student, or that the student in question needs only limited assistance. But the Secretary's regulations make clear that public school officials must make the final decision with respect to delivering services to any particular student. 34 C.F.R. 200.11(b)(3).

Respondents also argue that, as the program operated in New York before *Aguilar*, public school teachers "were assigned to parochial schools on a purely voluntary basis." Resp. Br. 3. It is true that teachers in New York were not compelled to work in a nonpublic school setting, and thus, in that sense, teachers voluntarily worked in nonpublic schools. J.A. 48. Respondents point to no evidence, however, that Title I teachers could or did effectively fill positions by volunteering to work at particular schools or at schools with particular religious affiliations. Even for positions in the Title I program to which teachers applied, the Board of Education made the selection decision employing secular criteria, and the record demonstrates that "the religious affiliation of a teacher * * * ha[d] no bearing on the decision to appoint the teacher to the nonpublic school Title I program or on the assignment of teachers * * * to particular nonpublic schools whose students receive Title I remedial services." *Ibid.* Furthermore, in the pre-*Aguilar* program in New York City, "[n]o teacher or other professional ha[d] sought reassignment to a different nonpublic school * * *

for religious reasons." J.A. 49. And affidavits in the record indicate that "the vast majority of [the teachers] work[ed] in nonpublic schools with religious affiliations different from their own." *Ibid.*

Respondents argue (without citation) that New York's Title I program relieved religious schools of their educational burdens by assuming the task of raising eligible students to grade level, thereby freeing religious school teachers to focus on the rest of the students in their class, who did not need remedial assistance. Resp. Br. 6, 42. It bears emphasis, however, that Title I and its implementing regulations require that Title I services supplement, not supplant, the students' regular classroom education. 20 U.S.C. 6322(b); 34 C.F.R 200.12(a).[7] If private school students receiving Title I services in a particular subject area no longer received regular services

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[7] In *Ball*, the Court rejected the school district's argument that the programs challenged there were constitutional because they "supplemented the curriculum with courses not previously offered in the religious schools and not required by school rule or state regulation." 473 U.S. at 396. The Court expressed concern that the argument "would permit the public schools gradually to take over the entire secular curriculum of the religious school, for the latter could surely discontinue existing courses so that they might be replaced a year or two later by a [public-supported] course with the same content." *Ibid.* Title I, however, does not present that danger, for it is a national program offering services only for a "small, identified segment of the student population." *Committee for Pub. Educ. & Religious Liberty* v. *Secretary, United States Dep't of Educ.*, 942 F. Supp. 842, 866 (E.D.N.Y. 1996). The program is not intended to, and does not, provide instruction to all or most students at public or nonpublic schools, and the program is specifically designed to ensure that those schools do not curtail their core efforts of educating their students in order to shift the cost of education to the federal program.

from their school in that area, there would likely be a violation of the statutory and regulatory prohibitions against "supplanting." See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 660-661, 670-671 (1985); *Hawaii Dep't of Educ.* v. *Bell*, 770 F.2d 1409, 1414-1415 (9th Cir. 1985); see also *New York* v. *United States Dep't of Educ.*, 903 F.2d 930, 934 (2d Cir. 1990). Thus, private schools cannot shift to the federal government or the public schools the task of providing students with their education. Cf. *Zobrest*, 509 U.S. at 12 (noting that the religious school "is not relieved of an expense it otherwise would have assumed in educating its students" when a deaf child attending the school is accompanied by state-paid interpreter).[8]

More fundamentally, all of respondents' criticisms of the effects of the Title I program in New York

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[8] *Amici* Americans United for Separation of Church and State, *et al.*, argue (Br. 27) that the Title I statute and regulations do not reveal "whether the parochial schools would have felt obligated to increase their own spending for remedial education in the absence of Title I funding." But in order to ensure that Title I funds do not benefit the private schools themselves, the regulations require that local education authorities may not use Title I funds to supplant services "that would, in the absence of Title I services, be available to participating children in private schools." 34 C.F.R. 200.12(a). Thus, Title I funds may not be used to offer remedial services that private schools would have offered in the absence of such funding.

The same *amici* also argue (Br. 27) that a parochial school that provides remedial education for its own students "is still eligible for Title I funding" so long as it does not reduce any money from its own budget. Private schools, however, are not eligible for Title I funding at all. All funds for services to private school students must remain under the control of a public agency. 20 U.S.C. 6321(c)(1).

before *Aguilar* have little to do with the fact that the services were provided inside religious school buildings, which was the basis for the decision in *Aguilar*. Private and public personnel must consult about the supplementary services appropriate to particular students wherever those services are provided; thus, respondents' submission would require that any program involving such consultation be held violative of the Establishment Clause. Respondents' argument would expand *Aguilar*'s holding to invalidate any provision of Title I services to religious school students, or at least any services that required nontrivial contacts between public authorities and religious school administrators. None of this Court's Establishment Clause decisions supports such an argument, which is contrary to *Wolman* v. *Walter*, 433 U.S. 229, 247-248 (1977) (upholding therapeutic, guidance, and remedial services provided to students off premises of parochial school), and has been uniformly rejected by lower courts (see Gov't Br. 6, 27).[9] "Yet it is difficult to

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[9] By contrast, *amici* American Jewish Congress, *et al.*, suggest that a Title I program delivering services to students inside parochial school buildings would be constitutional if public authorities controlled teacher assignments, curriculum, and the student selection process, and if the classrooms where the instruction occurs were under public control and free of religious symbols. See Br. 19. Putting to one side the details and exact phrasing of the conditions suggested by *amici*, we believe that substantially all of those factors are already required by Title I or the Secretary's current regulations, with the exception of removing religious symbols from the private school classroom. See 20 U.S.C. 6321(*c*); 34 C.F.R. 200.11(b)(3), 200.13. The Department of Education's current policy guidance does advise that mobile instructional units parked on private school property should be free of religious symbols. See

understand why a remedial reading class offered on parochial school premises is any more likely to supplant the secular course offerings of the parochial school than the same class offered in a portable classroom next door to the school." *Aguilar*, 473 U.S. at 426 (O'Connor, J., dissenting).

c. Finally, respondents argue that New York's pre-*Aguilar* Title I program was impermissible because there is "no sure way" to prevent public employees teaching inside religious school buildings from supporting the religious mission of those schools. Respondents defend the *Aguilar* ruling as a "prophylactic measure" (Resp. Br. 14, 31, 43) to prevent any potential danger of such support, and submit that it should not be "assumed" that public school teachers and counselors would not, "by reason of their professional training, the details of the Program in question, and the fact that they were under * * * state control," advance the religious mission of the private schools where they teach (*id.* at 30).[10] They also maintain that the danger of such support by public school teachers cannot be prevented by "any workable system of surveillance" (*id.* at 43).

United States Dep't of Education, *Title I, Part A Policy Guidance: Improving Basic Programs Operated By Local Educational Agencies*, Providing Services to Eligible Private School Children 17 (Apr. 1996) (lodged with the Clerk).

[10] Respondents state that public-school teacher professionalism and good-faith should not have been assumed "until there was proof to the contrary." Resp. Br. 30. This suggests that, even under respondents' view, adequate proof of the absence of any realistic danger of conscious or unconscious proselytism should suffice to uphold the provision of Title I services inside religious school buildings.

We disagree with respondents' premise that there is a realistic danger of public-school teacher support of the religious mission of a nonpublic school *whenever* public educational services are delivered by public employees inside religious school buildings. We certainly do not believe that the courts should *presume* that public school teachers will disregard their professional training and their express obligations to remain secular because of their presence in the religious institution. Unlike the payments to religious school teachers struck down in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and the state-funded Community Time program struck down in *Ball*, in which the courses were "overwhelmingly taught by instructors who [were] current full-time employees of the parochial school," 473 U.S. at 399 (O'Connor, J., concurring in the judgment in part and dissenting in part), Title I services are delivered by public school teachers who are under public control and are assigned to nonpublic schools without regard to the religion of either teacher or school. The prospect of public-supported religious activity is minimal in such a situation.

Nor does the record suggest any actual danger of wrangling or conflict between public and religious authorities over the content of each other's instruction or the way in which that instruction is given. The entanglement doctrine guards against the interference by government or religion with the affairs of the other sphere. See *Lemon*, 403 U.S. at 614. But as in other aspects of Establishment Clause jurisprudence, the "measure of constitutional adjudication" in entanglement cases is the distinction "between real threat and mere shadow." *Marsh* v. *Chambers*, 463 U.S. 783, 795 (1983) (quoting *School*

Dist. of Abington v. *Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)). When secular educational services are delivered by public employees under public supervision, using funds that remain at all times under the control of a public agency, there is, again, little reason to *presume* that public authorities will attempt to supervise the conduct of the church, or that religious authorities will seek to influence the content of the public curriculum. If such a problem actually arises in a particular case, then the courts can address that problem appropriately. See *Kendrick*, 487 U.S. at 621-622. But the rule of *Aguilar*, flatly forbidding public school teachers from entering religious school buildings to give remedial education, is much broader than necessary to safeguard the liberty protected by the Establishment Clause.

* * * * *

For the foregoing reasons, and for those set forth in our opening brief, the Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), should be overruled. Accordingly, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions to vacate the injunction.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

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Nos. 96-552 & 96-553

In The

Supreme Court of the United States

October Term, 1996

RACHEL AGOSTINI, *et al.*,

Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF SARAH PETER, JOAN PETER, AARON WESTENDORP, KRISTA WESTENDORP AND DOUGLAS WESTENDORP IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amici curiae Sarah Peter, Joan Peter, Aaron Westendorp, Krista Westendorp and Douglas Westendorp have sought the consent of the parties to participate in this matter by the filing of the enclosed brief. Consent letters from counsel for all parties to file this brief are on file with the Clerk in accordance with Rule 37.3, except that counsel for Respondents Felton, *et al.*, has withheld consent, necessitating this motion.

This motion and the enclosed brief are filed in support of the Petitioners Agostini, *et al.*, to inform the Court of the interests of children with acute disabilities resulting in special education needs and to show how the decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), has been applied by state and local governments and school officials to discriminatorily deny statutorily mandated special education services solely because the student with a disability attends a private *religious* school.

As set forth more fully in the "Interest of the Amici" section of the attached brief, *amici* are children with physical and cognitive disabilities that require special education assistance, and the parents of these children, who live in Minnesota. Under state law, the children, Aaron Westendorp (age 11) and Sarah Peter (age 5), are eligible for special education services, including the assistance of a paraprofessional aide in their regular classrooms. However, state and local authorities, relying on the *Aguilar* decision, refused to provide these services at the families' chosen private schools, because of the religious character of those schools. As a consequence, their parents have

been forced to remove Aaron and Sarah from their chosen religious schools and enroll them in public schools, in order to obtain the needed paraprofessional assistance.

The experience of *amici* under the Minnesota statutory and regulatory regime offers an important analytical complement to, and a unique perspective on, the issues presented by the pending case. In the instant case, New York City has sought to provide on-site remedial education services to needy students, without difference or discrimination based on the religious character, message, or viewpoint of a child's school, but the injunction in *Aguilar* bars them from doing so. Petitioners have sought review in order to be freed of this barrier. *Amici* are in a somewhat different situation. In *amici*'s case, the State of Minnesota, relying on *Aguilar*, has barred local school districts from providing paraprofessional classroom aides to students attending private religious schools. The Peter and Westendorp families, and others like them, have suffered the full brunt of *Aguilar*'s application, forcing them to choose between their constitutional right to pursue a religious education and their statutory rights to receive critically necessary and otherwise unavailable special education services.

From the perspective of *amici*, the question of whether *Aguilar* should be overruled thus involves more than simply the need to remove an impediment to the smooth and educationally sound operation of a beneficial government program; for Sarah Peter and Aaron Westendorp, *Aguilar* involves a question of *individual rights* – the right to freedom of religious choice, without government interference; and the right to receive statutory educational benefits designed to address one's disabilities,

without being discriminated against because of one's religious exercise, expression, or affiliation. *Amici* thus offer a unique and important perspective on the constitutional issues presented by the pending case.

Amici are particularly telling examples of the discrimination that has been suffered by students with disabilities who attend private religious schools in the wake of *Aguilar*. The *Aguilar* case has visited very real and harsh consequences in the lives of *amici* and others similarly situated – individuals who have had to bear other harsh burdens because of their disabilities.

Amici thus have a direct and important interest in the resolution of the instant case, and a valuable perspective to offer concerning the legal issues presented therein. *Amici* therefore respectfully urge that the Court grant this Motion for Leave to File a Brief *Amicus Curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether *Aguilar v. Felton*, 473 U.S. 402 (1985) should be overruled.

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INTEREST OF AMICI CURIAE

Amici are litigants in a case currently pending in the United States District Court for the District of Minnesota, *Peter, et al. v. Johnson, Commissioner, et al.*, No. 4-96-642, the resolution of which will be substantially affected by this Court's decision in the instant case. *Amici* are children who have physical and cognitive disabilities that require special education assistance, and the parents of these children.

Sarah Peter, age five, has Down Syndrome, resulting in physical and cognitive disabilities that require the presence of a paraprofessional aide to assist Sarah in her regular classroom. Her mother, Joan Peter, enrolled Sarah in the Noah's Ark Preschool, a Christian Preschool in Buffalo, a small town in central Minnesota. Mrs. Peter selected Noah's Ark because of her religious beliefs and her desire that these religious values be imparted to Sarah, and because Noah's Ark offered the best overall preschool program for Sarah's special needs. Mrs. Peter sought special education services for Sarah, to be provided at Noah's Ark, through her local school district, pursuant to state law.

Aaron Westendorp, age eleven, has very serious disabilities resulting from a brain stem lesion. Aaron is partially paralyzed from the eyes down, has spastic quadriparesis, breathes through a permanent tracheostomy, eats through a permanent gastrostomy tube, and is unable to speak. He has full cognitive functions and communicates through the use of finger spelling. Aaron's disabilities require the full-time presence of a paraprofessional classroom aide in his regular classroom to help in adapting classroom tasks to accommodate Aaron's physical disabilities, to attend to his personal care needs, and

to translate his finger spelling so that he can participate in regular classroom discussions and activities. Aaron's parents, Douglas and Krista Westendorp, enrolled Aaron in Calvin Christian School, a small Christian K-8 school in Edina, Minnesota, a suburb of Minneapolis. The Westendorps' two older daughters had attended Calvin Christian School. The family had chosen the school because of its excellent academic program, its Christian character and teaching, and their desire that the Westendorp children be taught in accordance with these religious values. Initially, the Westendorp family obtained private financial support for Aaron's special education needs through their church. When such support ceased to be available, the Westendorps were forced to withdraw Aaron from Calvin Christian School.

The State of Minnesota and the local public school districts in which these families reside refused to provide special education services to Sarah Peter and Aaron Westendorp, in the form of paraprofessional classroom assistants, so long as the children were attending religious private schools. Under state law, both Sarah and Aaron are entitled to special education services and have been determined to be entitled to the assistance of a paraprofessional classroom aide. State law provides that such services are to be furnished, when so indicated by the nature of the child's needs, on the premises of the child's regular school, including a nonpublic school, as long as such a private school "is not church related, is not controlled by a church, and does not promote a religious belief." Minn. Stat. § 123.932, subd. 3a, Minn. Rule 3525.1150, subp. 2. The effect of the Minnesota statutes and rules is that children with disabilities attending private *nonreligious* schools may receive special education

services at their schools, but children with disabilities attending private *religious* schools may not.

As a consequence of these state laws and rules (and the local school districts' implementation of them), neither Sarah Peter nor Aaron Westendorp could receive special education services at the religious schools selected by their parents. Joan Peter was forced to remove Sarah from Noah's Ark Christian Preschool and to enroll her in a public Head Start program in order to obtain the paraprofessional assistance necessary to her education. Similarly, Douglas and Krista Westendorp removed Aaron from Calvin Christian School and enrolled him in a public elementary school because they could not otherwise afford to pay for the paraprofessional assistance Aaron needs for his education.

The Minnesota state statutes and rules governing provision of special education services by local school districts – especially the definition of "neutral sites" at which such services may be provided – are designed to track this Court's holding in *Aguilar v. Felton*, 473 U.S. 402 (1985) and have been so explained in official policy statements of the State Attorney General's office. Memorandum of Assistant Attorney General Steven Liss (Exhibit G to Complaint in *Peter v. Johnson*, No. 4-96-642 (D.Minn.)). In defending the lawsuit brought by *amici*, the State of Minnesota has resisted the families' requests for declaratory and injunctive relief on the ground that *Aguilar* and *Grand Rapids v. Ball*, 473 U.S. 373 (1985) forbid the provision of paraprofessional assistants on the premises of a child's *religious* nonpublic school. The State contends that its implementing rules are mandated by *Aguilar* and require disparate treatment of children with disabilities based upon their attendance at a private religious (as

opposed to a private nonreligious) school. The State of Minnesota has sought to distinguish this Court's decision in *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462 (1993), on the ground that the nature of paraprofessional services differs from that of a sign-language interpreter, and that *Zobrest* did not overrule *Aguilar* and *Grand Rapids v. Ball*, 473 U.S. 373 (1985). *See* Memorandum of State Defendants in Opposition to Plaintiffs' Motion for Preliminary Injunction at 14 ("*Zobrest* did not extend to services beyond those provided by a sign-language interpreter who merely translates exactly what is said in class.").

Peter v. Johnson is currently awaiting decision on plaintiffs' motions for preliminary injunction and for partial summary judgment, and defendants' motions to dismiss. The motions were argued on November 8, 1996. Obviously, this Court's disposition of the pending case, *Agostini v. Felton*, Nos. 96-552 & 96-553, in particular its resolution of whether *Aguilar v. Felton* should be overruled, will have a direct and important effect on *amici* and the litigation in which they are parties. In addition, it is no exaggeration to say that the continued apparent authority of *Aguilar v. Felton* and *Grand Rapids v. Ball* has forced these children and their families to withdraw from their private religious schools in order to obtain special education services to which they are otherwise entitled as a matter of law. They may attend religious school only at the cost of abandoning special education benefits that they desperately need, and which their parents cannot otherwise afford to provide.

SUMMARY OF ARGUMENT

Aguilar v. Felton, 473 U.S. 402 (1985), was wrongly decided and should be overruled. The correct rule of decision in this case is supplied by this Court's decision in *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462, 2467 (1993) (citation omitted): "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' . . . provision of that service does not offend the Establishment Clause." *Aguilar v. Felton*, we submit, is irreconcilable in principle with this rule. A majority of the members of this Court has noted this conflict in subsequent cases. *See Board of Education of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2498 (O'Connor, J., concurring in part and in the judgment); *id.* at 2505 (Kennedy, J., concurring in the judgment); *id.* at 2515 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). This case presents an appropriate occasion for resolving the conflict.

We submit that the *Zobrest* rule is the correct one. The Establishment Clause requires that government not coerce or induce religious exercise; that government's secular public programs be designed and administered in a religion-neutral manner; that government accommodations of religion be neutral as among religions and not impose substantial burdens on nonbelievers; and that government not itself engage in religious expression that endorses religion to such a degree as to impair the political standing or religious freedom of nonbelievers or believers in other faiths.

The decision in *Aguilar v. Felton* stands outside of – indeed, in some respects is *contrary* to – these general principles delineating the Court's Establishment Clause

jurisprudence. *Aguilar* depends on a rigid, uncompromising, and artificial "strict separation" that is unsupported by the history of the First Amendment and not required to prevent religious coercion, improper endorsement, or the burdening of nonbelievers. Moreover, *Aguilar*'s rule is not consistent with the principle of neutrality expressed in *Zobrest* and so many of the Court's other cases. Indeed, we submit that the rule expressed in *Aguilar v. Felton* - that a student attending a religious private school may not receive the benefit of education programs to which he or she is otherwise entitled if such programs would involve the presence of public school teachers at religious schools to carry out the program – affirmatively *violates* the neutrality principle. In short, *Aguilar*'s rule authorizes discrimination against religious exercise and the choice of religious education.

Amici's own situation illustrates the problem. Sarah Peter and Aaron Westendorp (and their parents) have been told that they may receive special education services only if they do not attend a private religious school. They have been put to a cruel choice: sacrifice their constitutional right to choose religious education (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *see Employment Division v. Smith*, 494 U.S. 872, 881 (1990)) or sacrifice their statutory right to receive crucial special education services. The dilemma for schoolchildren in the instant case is similar, if less severe: they may receive remedial education only if they are removed from their schools and made to travel, sometimes at great inconvenience, to public school sites. In principle, however, the situations are alike: individuals are deprived of a statutory benefit, or otherwise penalized in their ability to receive or make use of it,

because of the decision to pursue a religious education. *See Aguilar*, 473 U.S. at 431 (O'Connor, J., dissenting).

Such a result is surely not compelled by the First Amendment; indeed, we believe that such an outcome is affirmatively inconsistent with the First Amendment. As Justice O'Connor has put it: "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. . . . If the government provides this [special] education on-site at public schools and at nonsectarian private schools, it is only fair that it provides it on-site at sectarian schools as well." *Kiryas Joel*, 114 S.Ct. at 2498 (O'Connor, J., concurring).

That is what this case is about: discrimination. Specifically, it is about whether the Establishment Clause requires discrimination against religion – against "religious ideas, religious people, or religious schools" in the context of secular government programs. *Kiryas Joel*, 114 S.Ct. at 2498 (O'Connor, J., concurring). We submit that such discrimination violates the Free Exercise and Free Speech clauses of the First Amendment. *Aguilar* needs to be overruled in order to bring the Court's Establishment Clause jurisprudence into line with the rest of its First Amendment jurisprudence.

Amici will make two broad points in this brief: First, the Establishment Clause, properly construed, does not *require* the rule of *Aguilar*. Second, the Free Speech and Free Exercise clauses *forbid* the rule of *Aguilar*. In making these points, we will highlight the analogous situation of *amici*, Sarah Peter and Aaron Westendorp, and show how

Aguilar punishes children and their families because of their religious exercise and choice of religious education.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT FORBID NEUTRAL PROVISION OF GOVERNMENT BENEFITS TO STUDENTS ATTENDING PRIVATE RELIGIOUS SCHOOLS, INCLUDING PROVISION OF ON-PREMISES SPECIAL OR REMEDIAL EDUCATION SERVICES.

The question presented by this case is whether the Establishment Clause requires some degree of discriminatory treatment of students attending religious schools, in order to preserve a degree of "separation" of church and state *not* dictated by the requirement of neutrality, *not* necessary to avoid government coercion of religion, and *not* required to avoid improper endorsement of religion. In doctrinal terms, the question is sometimes cast in terms of avoiding "excessive entanglement" between government and religion. *Aguilar*, 473 U.S. at 409-414 (1985); *see Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The question here is whether "entanglement" concerns legitimately may be used to invalidate *neutral* government policies, and thus require exclusion of religious persons or groups from the equal benefit of secular government programs.

Amici submit that such notions of "separation" and "entanglement" cannot properly be used to justify departures from neutrality – that is, discrimination against religion – in the administration of government programs. The Establishment Clause does not require such an extreme and insensitive result; moreover, such a result

would be at war with the rest of the First Amendment. Rather, where the requirement of neutrality is satisfied, and where the government program involves no coercion or special endorsement of religious activity, the Establishment Clause is satisfied. To the extent that *Aguilar* holds to the contrary – and affirmatively sanctions discrimination against religion – it should be disapproved.

A. The Establishment Clause Requires Government Neutrality, Noncoercion and Nonendorsement With Respect to Religious Exercise; It Does *Not* Authorize Discrimination Against Religion.

It is difficult (and perhaps undesirable) to attempt to reduce the Establishment Clause to a single judicial "test" or formula. *See Kiryas Joel*, 114 S.Ct. at 2498-99 (O'Connor, J., concurring). The rigid "*Lemon* test" has, in our view, rightly been discarded by a majority of the Court. *See id.* (O'Connor, J., concurring) (noting Court's abandonment of *Lemon* test); *see generally* Michael S. Paulsen, *"Lemon is Dead,"* 43 Case Western Res. L. Rev. 795 (1993). Nonetheless, certain general principles remain clearly marked out by this Court's cases and can be identified as setting forth the core governing principles of the Establishment Clause:

First, government must not coerce or induce religious exercise. *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Engel v. Vitale*, 370 U.S. 421 (1962).

Second, government's secular public programs must be designed and administered in a religion-neutral manner, so as to assure that they involve neither financial promotion of religion nor financial discrimination against religious individuals, groups, or speakers. *Rosenberger v.*

Rector and Visitors of the University of Virginia, 115 S.Ct. 2510 (1995); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *see Bowen v. Kendrick*, 487 U.S. 589 (1988).

Third, governmental accommodations of religion must be reliably neutral among religions and not impose substantial burdens on nonbelievers. *Kiryas Joel*, 114 S.Ct. 2481; *Texas Monthly v. Bullock*, 489 U.S. 1, 27-29 (1989) (Blackmun, J., concurring); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring).

Fourth and finally, government must not itself engage in religious expression to such a degree as to impair the political standing or religious freedom of non-believers or believers in other faiths. *Compare, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984) *with County of Allegheny v. ACLU*, 492 U.S. 573 (1989).[1]

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[1] We recognize that this last principle identifies an area in which the Court has been intensely divided. *Compare Allegheny*, 492 U.S. at 614 (Blackmun, J.) (stating holding of the Court) (invalidating government display of a creche but not of a menorah) *with id.* at 645-55 (Brennan, J.) (creche display and menorah display both unconstitutional); *id.* at 663 (Kennedy, J.) (neither creche display nor menorah display unconstitutional).

We submit that the formulation set forth in the text is an accurate and useful restatement of the non-endorsement principle as expounded by members of this Court, despite differences that may exist as to its relevance or application to any particular case. The crucial operative features, in our view, are that it applies only to situations of government *speech* (literal or symbolic) and that it invalidates such expression only when it has or is likely to have the actual effect of interfering with persons' religious or political liberty. It does not apply merely because some individual might express a sense of subjective affront, no matter how unreasonable or idiosyncratic. *See Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J.,

These four touchstones fit together to form a coherent and unified whole: (i) noncoercion, (ii) neutrality in government's secular programs, (iii) neutrality (and noncoercion) in government accommodation of religion, and (iv) nonendorsement. This Court has noted that, at a minimum, the Establishment Clause forbids government compulsion of religious worship or exercise through means direct or indirect. *Lee v. Weisman*, 112 S.Ct. 2649 (1992). The noncoercion principle is reinforced by the requirement that government's public programs be operated in a manner that is *neutral* with respect to religion. Religion may be neither favored nor disfavored within such programs. Thus, a government program must neither be "skewed towards religion," *Zobrest*, 113 S.Ct. at 2467 (quoting *Witters v. Washington Dept. of Services for Blind*, 474 U.S. 481, 488 (1986)); *see Kendrick*, 487 U.S. at 608-609, nor impose special burdens or disabilities on persons or groups because of their religious status, affiliation, identity or expression. "State power is no more to be used so as to handicap religions, than it is to favor them." *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

In this respect, the neutrality principle unites the Court's Establishment Clause, Free Exercise Clause, and Free Speech Clause jurisprudence. *See, e.g., Rosenberger,*

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concurring). But in situations where government speech actually impairs political and religious liberty, there is an actual departure from the core requirement of neutrality.

As we argue below, however, mere speculation concerning the possibility that some will perceive a "symbolic union" of religion and government merely from the fact of government's provision of a neutral, secular benefit, on equal terms, to religious beneficiaries, is surely not sufficient to identify a violation of the Establishment Clause. *See infra* at 16-17.

115 S.Ct. at 2517 (Free Speech Clause forbids exclusion from a government benefit on the basis of a person's or group's religious "premise," "perspective," or "standpoint"); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S.Ct. 2141 (1993) (Free Speech Clause forbids discrimination on basis of religious viewpoint or perspective); *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S.Ct. 2217, 2226 (1993) (unconstitutional to discriminate against religion or prohibit conduct only when engaged in for religious reasons); *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status.").[2]

The neutrality principle is, in a sense, an extension of the noncoercion principle, for the obvious reason that departures from neutrality – in either direction – will tend to have coercive effects on religious exercise. Favoritism or special financial support of religious exercise or affiliation, for example, will tend to induce such participation or affiliation, in order to gain the unique benefit. *Cf. Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (striking

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[2] *See also Widmar v. Vincent*, 454 U.S. 263 (1981) (unconstitutional to discriminate against religious speech in a limited public forum); *McDaniel v. Paty*, 435 U.S. 618 (1978) (unconstitutional for a State to exclude a minister from eligibility for public office on the basis of religious exercise, affiliation, or occupation); *id.* at 639 (Brennan, J., concurring in the judgment) ("[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."); *Everson*, 330 U.S. at 16 (government "cannot exclude . . . the members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.").

down sales tax exemption exclusively for religious publications). Likewise, discrimination or special financial penalties attributable to religious exercise or affiliation will tend to discourage such participation or affiliation, in order to avoid the penalty. *Cf. Rosenberger*, 115 S.Ct. 2510; *see also Thomas v. Review Board*, 450 U.S. 707, 714-18 (1981) (financial penalty constitutes a "burden" on religious free exercise).

The requirements of noncoercion and neutrality carry over into a third area: accommodation of religion. It is well established that " 'government may (and sometimes must) accommodate religious practices, and that it may do so without violating the Establishment Clause.' " *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144-145 (1987)). Of course, where government seeks to accommodate religion, it is being specially cognizant of religion. This is different from other secular programs of government, in that the government's "secular interest" is one of furthering *religious* liberty. The requirements of neutrality and noncoercion play out slightly differently in this context. Government need not *disregard* religion; to the contrary, taking account of religious differences and unique needs is what accommodation is all about. But government may not *discriminate* among religions in making such accommodations. Indeed, this Court has struck down accommodations where there was insufficient assurance that accommodation would be granted to others in like circumstances. *Kiryas Joel*, 114 S.Ct. at 2493-94. Nor may government, in the guise of accommodation, impose such large, unequal burdens on nonbelievers as would constitute, in effect, an inducement or coercion to engage in the accommodated

religious practice. *Cf. Estate of Thornton*, 472 U.S. 703. In short, government accommodation of religion is permissible only when it is neutral among religions, facilitates religious practices independently adopted by their adherents rather than induces them, and does not amount to a transfer of resources or benefits from nonbelievers to believers in a manner unrelated to relieving genuine burdens on the free exercise of religion. *See generally* Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

The fourth principle, nonendorsement, has sometimes provoked division among the members of this Court. However, the nonendorsement principle can be seen as consistent with the notions of neutrality and noncoercion. "Nonendorsement" is the test applicable to government religious speech (including symbolic expression); that is, it applies where the government is *not* being neutral about religion, in order to test whether the effect of such government religious speech is, in essence, to coerce compliance with some government-sponsored notion of religious orthodoxy. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). The nonendorsement principle's roots can be traced to the famous statement of Justice Jackson for the Court in *West Virginia State Board of Education v. Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. 624, 642 (1943).

Government *prescription of religious orthodoxy* is the harm to be avoided in this context – not mere government speech that touches on religious themes or acknowledges the religious observances of the people. The relevant inquiry, we submit, is whether government has itself engaged in religious expression that endorses religion to such a degree as to impair the political standing or religious freedom of nonbelievers or believers in other faiths. *Cf. Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). Such an approach is consistent with *Barnette*'s condemnation of government prescription of orthodoxy generally, through its use of messages and symbols and through the use of state power to compel or induce adherence to such orthodoxy. So understood, the nonendorsement principle harmonizes with the other cornerstone principles of noncoercion, neutrality, and equal accommodation.

B. The Programs at Issue Here Satisfy the Establishment Clause's Core Requirements of Neutrality, Noncoercion, and Nonendorsement and Involve No Special Accommodation of Religion; *Aguilar v. Felton* Should Be Overruled on the Basis of the Rule Announced in *Zobrest v. Catalina Foothills School District*.

We think it plain that the Title I / Chapter I arrangements at issue in *Aguilar* and again today – and other programs like it – satisfy these four principles. There is no plausible claim that allowing remedial or special educational services to be provided on the premises of a religious school by public employees coerces religious exercise. The students' families independently chose religious education. *Zobrest*, 113 S.Ct. at 2469; *Witters*, 474 U.S. at 487. They receive no special "benefit" from being

eligible to receive secular services on the premises of their regular school of attendance; they receive only what other similarly situated needy students receive. *Equal inclusion* within a public benefit program cannot be thought "coercive."

It is equally plain that inclusion on equal terms is *neutral* and furthers the secular purpose of reaching disadvantaged students wherever they are – be it public school or religious or nonreligious private school – rather than imposing the additional cost and hardship of forcing these disadvantaged children to travel to public school premises. *See Aguilar*, 473 U.S. at 423-425 (O'Connor, J., dissenting). The neutrality of the program is especially evident where the program at issue supplements, rather than supplants, a private school's existing curriculum. *Id.* at 425-426. Under such circumstances, there can be no possibility that the program is really a disguised attempt affirmatively to sponsor, through preferential funding, religious instruction. Indeed, quite the contrary, the arrangement mandated by *Aguilar* has the consequence of *disfavoring* religious instruction by imposing unique penalties and burdens on families who choose it.

The program at issue is not an "accommodation" of religion in the sense of government voluntarily exempting some religious person or group from a rule of otherwise general applicability. The rule that the New York school board hopes to use is religion-blind: on-premises services for everyone who is eligible under strictly secular criteria.

Nor would such a practice constitute "endorsement" of religion. This is not a case of government embrace of a religious symbol, *cf. Allegheny, supra*, or government prescription as to the preferred use of a "Moment of Silence"

in public schools, *cf. Wallace v. Jaffree*, 472 U.S. 38 (1985). It is a case of a genuinely neutral government program. With respect, the "symbolic union" argument of the majority in *Grand Rapids v. Ball*, 473 U.S. 373 (1985), the companion case to *Aguilar*, is simply unpersuasive, and has not stood the test of time. Any suggestion that neutral provision of services constitutes an *actual* endorsement of religion is, of course, specious. The "symbolic union" argument thus reduces to the proposition that schoolchildren or other members of the public will *wrongly* view neutrality as sponsorship and that the Court should indulge the error and abandon neutrality in favor of actual discrimination against religion.

This Court emphatically rejected such an approach in *Board of Education v. Mergens*, finding that schoolchildren and the general public are able to understand that a policy of neutrality does not constitute sponsorship or endorsement of religion. 496 U.S. 226, 250 (1990). Just as a reasonable observer (including students) should understand "that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis," *id.* at 250, so too, a reasonable observer should be able to understand that equal access to a secular government education benefit or service does not constitute government sponsorship of religion. *Mergens*, we submit, highlights the error of the "symbolic union" analysis as applied in *Grand Rapids* and significantly undermines its authority as precedent.

The principles of neutrality, noncoercion, and nonendorsement thus all point in one direction: the rule of

Aguilar and *Grand Rapids* is not required by the Establishment Clause, nor is it consistent with the central animating principles this Court has embraced. The correct rule is as this Court stated it more recently in *Zobrest*:

> When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' . . . provision of that service does not offend the Establishment Clause.

113 S.Ct. at 2467 (citation omitted).

That rule, we submit, controls this case. What is at issue here is a neutral, secular program providing a benefit to needy schoolchildren. Under the standards set forth in *Zobrest*, there is simply no serious Establishment Clause difficulty with neutral provision of remedial or special education services to eligible students attending religious schools, on the same basis as they would be provided to eligible students attending nonreligious private or public schools. The Establishment Clause forbids favored treatment of religion, not neutral treatment.

The rule of *Zobrest* compels repudiation of *Aguilar* and *Grand Rapids*. This Court held in *Zobrest* that neutral provision of benefits does not become unconstitutional merely because those benefits are provided on the premises of, or in connection with instruction at, a private religious school. *Aguilar* and *Grand Rapids*, distilled to their essence, hold exactly the opposite. They are inconsistent with the overriding Establishment Clause mandate of neutrality and equal treatment. They are also inconsistent with the Free Exercise Clause and Free Speech Clause requirements that persons engaged in religious exercise and expression not be discriminated against within government programs on the basis of that religious activity. *Rosenberger*, 115 S.Ct. 2510 (1995); *Lamb's*

Chapel, 113 S.Ct. 2141 (1993); *Lukumi*, 113 S.Ct. 2217 (1993). In short, the rule of *Aguilar* and *Grand Rapids* is, in principle, affirmatively inconsistent with this Court's subsequent decisions in *Zobrest*, *Rosenberger*, *Lamb's Chapel*, *Lukumi*, and *Witters* – and arguably inconsistent with other decisions as well.[3]

Under these circumstances, we submit, it is appropriate and important that *Aguilar* and *Grand Rapids* be formally abandoned. Lower courts and, even more frequently, government agencies, are continuing to operate on the assumption that *Aguilar* and *Grand Rapids* forbid them to provide on-site education benefit programs to children attending private religious schools, in effect excluding them from such benefits.

Amici's own situation is illustrative. Minnesota's Special Education statutes and regulations, as interpreted

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[3] Though the question was not specifically presented in *Kiryas Joel*, a majority of the members of the Court openly questioned the correctness and doubted the continued validity of *Aguilar* and *Grand Rapids*. *Board of Education of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2498 (1994) (O'Connor, J., concurring in part and in the judgment) ("The Court should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track – government impartiality, not animosity, towards religion."); *id.* at 2505 (Kennedy, J., concurring in the judgment) ("The decisions in *Grand Rapids* and *Aguilar* may have been erroneous. In light of the case before us, and in the interest of sound elaboration of constitutional doctrine, it may be necessary for us to reconsider them. . . . *A neutral aid scheme, available to religious and nonreligious alike, is the preferable way to address problems such as the Satmar handicapped children have suffered.*") (emphasis added); *id.* at 2515 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) ("I heartily agree that these cases [*Grand Rapids* and *Aguilar*], so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity.").

and applied by state education officials, forbid on-site provision of paraprofessional classroom aides to students whose disabilities require such services, if the students attend a private religious school. These state statutes and regulations are binding on the local school districts that serve Aaron Westendorp and Sarah Peter. Accordingly, the school districts have refused to provide special education services at the religious schools chosen by the parents of these children. The State of Minnesota, and the respective local school districts, have sought to distinguish *Zobrest* on the ground that there exists a "critical distinction between a sign language interpreter and a paraprofessional/instructional aide." State Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, *Peter v. Johnson*, No. 4-96-642 (D. Minn. 1996) (decision pending). *Aguilar* and *Grand Rapids*, the government officials contend, control the latter situation.

Thus, Aaron Westendorp, an 11-year-old with severe paralysis through much of his body, is denied a paraprofessional because he needs a translator to interpret *his* communications (the exact reverse of the situation in *Zobrest*) and to adapt classroom tasks to accommodate his disability. This, the government officials and lawyers say, starts to stray too close to an "instructional" activity, and so is banned by *Aguilar*. Sarah Peter, a five-year-old with Down Syndrome, requires, because of her physical and cognitive disabilities, a paraprofessional to help her participate in her regular preschool program. This too, officials say, comes too close to "instruction." *Aguilar* has thus produced a bright-line rule that Sarah Peter may not receive a paraprofessional if her preschool program at Noah's Ark Preschool includes Bible stories – including,

of course, the story of Noah's Ark – or a prayer before the morning snack. *But see Hartmann v. Stone*, 68 F.3d 983 (6th Cir. 1995) (invalidating U.S. Army regulation prohibiting such religious activities during day care conducted in program providers' homes on base).

To be sure, the distinctions drawn by the Minnesota government officials in these cases are insensible and insensitive; they are doubtless wrong even under the *Aguilar* regime. But our point here is more fundamental: The continued existence of *Aguilar* and *Grand Rapids* as precedents *makes it both possible and inevitable for school officials to draw exactly such distinctions and devise such misguided bright-line prophylactic rules, with the result that children with disabilities or other special needs, whose families have chosen religious education, are discriminated against on the basis of that choice.*

We urge this Court to reaffirm that the Establishment Clause forbids government coercion of religious exercise, forbids selective endorsement of religion to such a degree as to impair the exercise of political or religious liberty, forbids preferential accommodations, and in general requires government *neutrality* toward religion. *See Kiryas Joel*, 114 S.Ct. at 2505 (Kennedy, J., concurring in the judgment). We simultaneously urge the Court to reiterate and emphasize that the Establishment Clause does not authorize or require any form of discrimination against religion, including rules that punish religious practice by imposing special disabilities on eligibility to participate in secular government programs. With respect, we submit that as long as *Aguilar* and *Grand Rapids* stand as

unreversed precedents of this Court, that message will not be clear.[4]

II. THE RULE OF *AGUILAR v. FELTON* VIOLATES THE FREE SPEECH CLAUSE AND THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Our final point is implicit in much of what we have already said: The rule of *Aguilar* is not only an unsound

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[4] Relatedly, as a doctrinal matter, we urge this Court to formally abandon "excessive entanglement" – the linchpin of *Aguilar* – as an independent test under the Establishment Clause. As noted above, the test as formulated in *Lemon* is incompatible with the rest of Establishment Clause analysis and its application frequently contradicts basic principles of the Free Exercise and Free Speech clauses. In our view, "entanglement" concerns properly belong on the free exercise side of the coin: "[E]xcessive entanglement of the state with religion is a form of burden on free religious exercise, abridging the liberty of the person or institution 'entangled' with, not a means of coercing, promoting, or even endorsing religion." Paulsen, *Lemon is Dead*, *supra*, 43 Case Western L. Rev. at 809.

A majority of the Court has long criticized the entanglement prong of *Lemon* as unsound in principle and unworkable in practice, *see Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988) (collecting cases), and the Court as a whole has not applied the entanglement test to invalidate government action in any case since *Aguilar*. *See Rosenberger*, 115 S.Ct. 2510 (1995); *Capitol Square Review and Advisory Board v. Pinette*, 115 S.Ct. 2440 (1995); *Kiryas Joel*, 114 S.Ct. 2481 (1994); *Zobrest*, 113 S.Ct. 2462 (1993); *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Mergens*, 496 U.S. 226 (1990); *Allegheny*, 492 U.S. 573 (1989); *cf. Lamb's Chapel*, 113 S.Ct. 2141 (1993) (noting test *arguendo* and rejecting its applicability). *See generally* Paulsen, *Lemon is Dead*, *supra*, 43 Case Western L. Rev. at 808-819 (1993) (noting decline and abandonment of *Lemon* test and ascent of noncoercion and neutrality as the central norms of Establishment Clause jurisprudence).

interpretation of the Establishment Clause, but one that affirmatively violates the Free Exercise and Free Speech clauses. If a state legislature of its own accord enacted a statute providing that education benefits or services should be open to all on an equal basis *except* those attending religious schools (who are disqualified or subjected to onerous burdens making their participation difficult or impossible), we have no doubt that this Court would strike it down as a core violation of the First Amendment. This, we believe, is the clear lesson of this Court's decisions in *Rosenberger*, 115 S.Ct. 2510 (1993), *Lamb's Chapel*, 113 S.Ct. 2141 (1993), *Widmar v. Vincent*, 454 U.S. 263 (1981), and *McDaniel v. Paty*, 435 U.S. 618 (1978).

The same principle should apply where the government action in question is a judicial decision rather than a statute. In this sense, *Aguilar* itself violates the First Amendment. We offer two brief points in elaboration: First, government policies or actions that exclude or discriminate against persons or groups on the basis of religious expression, affiliation, viewpoint, or identity violate the Free Speech Clause. Second, government policies or actions that exclude or discriminate against persons or groups on the basis of religious exercise, affiliation, identity, or motivation likewise violate the Free Exercise Clause. *Aguilar* and *Grand Rapids* violate both principles.

A. The Free Speech Clause Forbids Discrimination in Access to a Government Program or Benefit on the Basis of the Religious Content or Viewpoint of Expressive Activity.

Few propositions are more central to the First Amendment than the proposition that, in the absence of

compelling justification, government must not discriminate against or deny a benefit to a person because of the content of his speech or expression. This Court has made clear that content-based discrimination against speech is "presumptively invalid." *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2542 (1992). This includes government policies that exclude persons or groups from benefit programs or that make it more difficult or burdensome to participate in such programs, on the basis of the content of their speech or expressive conduct – including the expression of *religious* views and ideas. *Rosenberger*, 115 S.Ct. at 2516; *Lamb's Chapel*, 114 S.Ct. at 2147-48 ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (original quotation marks and citations omitted).

The rule of *Aguilar* violates these principles. *Aguilar* holds that government may provide secular remedial education services on the premises of public schools or non-religious private schools, but is constitutionally forbidden from providing the same services at religious private schools. This is a content-based, viewpoint-based regulation. A government benefit is provided to eligible persons except those who have chosen a religious-based education.

The Minnesota statutes and regulations at issue in *Peter v. Johnson* – derived from *Aguilar* – are explicit in this regard, making eligibility for a government benefit depend on the content and viewpoint of religious education. Special education services may be provided on the premises of private schools, as long as the school "is not church related, is not controlled by a church, and does not promote a religious belief." Minn. Stat. § 123.932,

subd. 9. It is the religious content of a school's program – the fact that the school "promote[s] a religious belief" – that supplies the basis for exclusion from special education benefits for children attending that school. It is the religious viewpoint of the school – the fact that it is "church-related" and thus religious in orientation and outlook – that disqualifies its students from receiving benefits to which they otherwise would be entitled. If a school promotes non-religious beliefs, or a secular philosophy, or some other system of values and principles (or none at all), parents may choose such a school for their child without forfeiting special education services. Only one perspective selected by parents for their children – religion – is singled-out as the basis for exclusion.

A family's choice of *religious* education is the choice of a particular expressive message. The parents of the children in *Aguilar* and the children in *Peter* have chosen religious schools for their children in whole or in part precisely because of the schools' religious messages and viewpoints and their desire to have such messages, values, and views transmitted to their children. In a very real sense, education is expression – of viewpoints, values, traditions – and the exercise by parents of the choice of religious education is the choice of a particular expressive viewpoint they wish conveyed to their children.

Clearly, discriminatory treatment by government, based upon the exercise of that expressive choice, is a presumptive violation of the Free Speech Clause. It is the "avowed religious perspective" (*Rosenberger*, 115 S.Ct. at 2518) of religious elementary and secondary schools, and the fact that they provide education "from a religious standpoint" (*Lamb's Chapel*, 113 S.Ct. at 2147) that triggers

the *Aguilar* rule. And clearly, the effect of that rule is discriminatory: Because of the religious content and viewpoint of the schools they attend (and that their parents have chosen), students attending religious schools are denied a benefit – *on-site* provision of education services, the method deemed most educationally appropriate to the students' situations.

We submit, therefore, that the rule of *Aguilar* is not only mistaken as a matter of Establishment Clause law, but *forbidden* as a matter of Free Speech law. Under this Court's cases, the rule of *Aguilar*, if adopted voluntarily as a legislative matter, would violate the Free Speech Clause. This, of course, is an important indicator that *Aguilar* is an unsound interpretation of the Establishment Clause. The First Amendment is not a self-contradiction. For *Aguilar* to be correct, however, the Court must both reaffirm an extreme and destructive interpretation of the Establishment Clause *and* hold that the Establishment Clause defeats the basic principles of Free Speech that would otherwise govern. The Court has consistently rejected that approach in the past, *see Rosenberger*, 115 S.Ct. at 2522 ("More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.") (collecting cases), and it should reject that approach here.

B. The Free Exercise Clause Forbids Discrimination in Access to a Government Program or Benefit on the Basis of Religious Belief, Exercise, Affiliation, or Status.

The Free Exercise Clause argument closely parallels the Free Speech Clause analysis. Just as the Free Speech Clause forbids government discrimination on the basis of religious expression, views, or ideas, the Free Exercise Clause forbids discrimination on the basis of religious belief, exercise, status, or affiliation.

Controversies concerning the Free Exercise Clause in recent years have focused on whether that clause may require special accommodation of religion, in the form of exemptions from laws of general applicability, where a facially neutral law or legal rule of general applicability uniquely burdens the free exercise of a particular religious practice. *See generally Employment Division v. Smith*, 494 U.S. 872 (1990). However, one principle remains at the agreed core of the Free Exercise Clause: Government must not discriminate against religion or religious exercise, in any manner, including within the context of government benefit programs. *Id.* at 877 ("The government may not . . . impose special disabilities on the basis of religious views or religious status."); *accord Church of Lukumi Babalu Aye*, 113 S.Ct. at 2226 (holding that "at a minimum," the Free Exercise Clause prohibits government discrimination against religion); *McDaniel v. Paty*, 435 U.S. 618, 639 (Brennan, J., concurring) ("[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."); *Everson*, 330 U.S. at 16 (government "cannot exclude . . . the members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public

welfare legislation."); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (unconstitutional discrimination under Free Exercise Clause for government to exclude religious child care providers from eligibility to participate in Army child care program).

The rule of *Aguilar* violates this core Free Exercise Clause requirement of nondiscrimination on the basis of religion. *Aguilar* requires that unique disabilities be imposed on program beneficiaries – here, children eligible for remedial or special education services – because of their exercise of a religious choice and affiliation with a school that has a religious identity or mission. As members of this Court observed in *Aguilar*, the disability imposed is not an insignificant one: impoverished children are forced to receive remedial education away from their usual schools, in circumstances not conducive to the most educationally effective method of providing them, and many needy children will be deprived of these services altogether – on the basis of religion. *Aguilar*, 473 U.S. at 431 (O'Connor, J., dissenting) (noting that "the Court's decision is tragic" for more than 20,000 children in New York City alone, and for others who live in cities "where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school."). For many more, the strains and difficulties in traveling to a different school to receive remedial or special education assistance will lead parents to choose to have their children forgo the benefit altogether. *See, e.g., Kiryas Joel*, 114 S.Ct. at 2485.

The situations of *amici*, Sarah Peter and Aaron Westendorp, once again illustrate the point. The nature of the education benefits to which these children are entitled are

on-site paraprofessionals to assist them with their disabilities, so that they can remain in their regular classroom environments. If on-site services cannot be provided, Sarah and Aaron lose the benefit entirely. If they are enrolled in religious schools, they cannot have the benefit of on-site paraprofessionals. They have been compelled to abandon their chosen private religious schools, in order to receive the special education services they need, because of the rule of *Aguilar*.

Seeking an education under religious auspices or with a religious orientation is a constitutional right protected under the Free Exercise Clause and allied constitutional provisions. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *cf. Smith*, 494 U.S. at 881. It is well established that government may not require a private individual to forfeit Free Exercise Clause rights as a condition of eligibility for benefits or participation in a government program. *Thomas*, 450 U.S. at 716. The rule of *Aguilar*, however, produces exactly such a result: Families like the Peter family and the Westendorp family are put to a choice of forfeiting their rights to enroll their children in religious schools or forfeiting valuable special education benefits. The imposition of the penalty of loss of special education benefits, or denial of equal opportunity to benefit from such programs, as a consequence of choosing a religious school, is a clear violation of the Free Exercise Clause of the First Amendment.

CONCLUSION

For the forgoing reasons, *Aguilar v. Felton* should be overruled. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,

Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Nos. 96-552 and 96-553

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The *amici* are national organizations that represent the American Orthodox Jewish community. We have consistently supported the principle of fair and even-handed

treatment for children who attend religious schools and for the parents who are obligated, for reasons of conscience, to enroll their children in such schools. The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs on behalf of these children and parents in numerous cases considered by this Court, including *Board of Education v. Allen*, 392 U.S. 236 (1968); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and, of course, *Aguilar v. Felton*, 473 U.S. 402 (1985).

The individual organizations represented by COLPA in this case are:

(1) Agudas Harabbonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

(2) Agudath Israel of America is a national Orthodox Jewish public interest organization with chapters in numerous Jewish communities throughout the United States and Canada. It is dedicated to advancing Jewish social, religious and educational concerns.

(3) National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

(4) The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400

members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

(5) The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply involved in issues related to religious freedom.

(6) Torah Umesorah-National Society of Hebrew Day Schools is the coordinating body for more than 600 Jewish Day Schools across the United States.

(7) The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America with over one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

When this case was last before this Court, in the 1984 Term, COLPA filed separate *amicus curiae* briefs in the case and in *Grand Rapids School Dist. v. Ball*, No. 83-990, decided at 473 U.S. 373 (1985). Our interest at that time was similar to our interest now, but the actual experience of more than a decade has proved that our dire predictions regarding the effect of an affirmance in the 1984-85 cases were accurate. This Court is now reconsidering *Aguilar*, and we hope it will, at the same time, reconsider and overrule *Ball*.

We said in our initial *Aguilar* brief (Brief for COLPA as *Amicus Curiae*, Nos. 84-237 and 84-238, p. 3):

> This case is of direct concern to the Orthodox Jewish community because the decision below wipes out a federally financed program that has assisted thousands of educationally disadvantaged Jewish children residing in low-income neighborhoods by providing for them remedial reading and remedial mathematical programs (taught predominantly by non-Jewish teachers, responsible only to their secular supervisors in the public-school system) merely because these remedial classes are given in the same buildings where the children receive their religious teaching.

This Court's affirmance of the Second Circuit's decision in *Aguilar* had the damaging effect we described. As detailed in an August 1993 study by the U.S. Department of Education, *Chapter 1 Services to Private Religious School Students: A Supplemental Volume to the National Assessment of the Chapter 1 Program*, the decision in *Aguilar* resulted in a considerable decline in the number of non-public school students participating in the program. The students who do participate in the program are serviced with "delivery machanisms" that are academically and socially unsatisfactory. And the expenses necessary to implement the alternate forms of service delivery are staggering.

The disastrous fallout from *Aguilar* has in addition extended beyond the Title I context in which the case arose. The most dramatic effect was, of course, in the Village of Kiryas Joel, where a substantial number of severely handicapped children of members of the Satmar Hasidic Community were deprived of all remedial programs because the local school authorities in Monroe, New York, refused to utilize "neutral sites" within the village. Extended state-court litigation produced a stand-off, and the New York

Legislature created a separate public-school district for the Village of Kiryas Joel. The constitutionality of that district was challenged, and the challenge resulted in this Court's ruling in *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994). Had *Aguilar v. Felton* not been governing constitutional law, there would have been no need for the New York legislation that this Court invalidated in that case. The learning-disabled children of Kiryas Joel would have received their remedial programs from public school teachers in the religious school buildings.

The *Kiryas Joel* case, and several others that have arisen in the post-*Aguilar* era (*see, e.g., Parents' Association of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986)), point to one of the most tragic ironies of the *Aguilar* decision: It has engendered precisely the type of "political divisiveness along religious lines" that Justice Brennan's majority opinion (473 U.S. at 414) claimed it was designed to avoid. *See also* Justice Powell's concurring opinion in *Aguilar*, 473 U.S. at 416. So long as *Aguilar* remains the law of the land, local education officials will struggle to balance competing requirements of providing religious school children with equitable Title 1 services within reasonable budgetary constraints while avoiding anything that might cross the line into forbidden establishment of religion. As a result, conflict is likely to arise again and again.

The Orthodox Jewish children attending Jewish religious day schools need the assistance that Title I can provide to them. Its benefits are directed at needy children, and its purpose is to make them productive American citizens. A decade of damage to school children is enough. We urge the Court expeditiously to overrule *Aguilar* and once again enable New York's public school personnel, under the authority of public school administrators, to enter

religious schools and help severely and moderately learning-disabled children adjust to American society.

ARGUMENT

I

STARE DECISIS SHOULD PLAY NO ROLE WHATEVER IN DECIDING THE CONSTITUTIONALITY OF TITLE I PROGRAMS IN RELIGIOUS SCHOOLS LOCATED IN NEW YORK

The Court's 5-to-4 decision issued in 1985 invalidating the application of New York's Title I program to religious schools should not present any barrier whatever to a plenary reconsideration of the constitutional issues. This Court said in *Payne v. Tennessee*, 501 U.S. 808 (1991), that notwithstanding the usual desirability of adhering to precedent, *stare decisis* should not govern constitutional cases because "correction through legislative action is practically impossible." 501 U.S. at 828, quoting Justice Brandeis, dissenting, in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932). The Court in *Payne* noted that it had overruled 33 constitutional decisions in the 20 Terms between 1970 and 1990. See 501 U.S. at 828-29, n. 1.

Overruling, said the Court, is particularly appropriate where the overruled holdings were "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." 501 U.S. at 828-29. Another standard is whether the decisions being overruled "are unworkable or are badly reasoned." 501 U.S. at 827. These criteria are satisfied in the present case. *Aguilar* produced a concurrence by Justice Powell (who was the fifth vote in the majority) and "spirited" dissents from Chief

Justice Burger (473 U.S. at 419), then-Associate Justice Rehnquist (473 U.S. at 420), Justice White (473 U.S. at 400), and Justice O'Connor (473 U.S. at 421). All the dissenters bemoaned the harmful consequences of the decision. Chief Justice Burger decried the decision as one that exhibits "paranoia" and "hostility toward religion." 473 U.S. at 419, 420. Justice White called the result "contrary to the long-range interests of the country." 473 U.S. at 400. Justice Rehnquist said the majority was "rely[ing] on gossamer abstractions to invalidate a law" that, in his words, provided "sorely needed assistance." 473 U.S. at 421. And Justice O'Connor called the decision "tragic" because it deprives children "of a program that offers a meaningful chance at success in life." 473 U.S. at 431. Even the late Judge Henry J. Friendly, whose Second Circuit opinion was affirmed, said that the Title I program in New York's religious schools "has done so much good and little, if any, detectible harm." 739 F.2d 48, 72 (2d Cir. 1984). *Aguilar* was unworkable, badly reasoned, decided by a majority of one, and subjected to severe criticism from the day it was issued. It deserves no respect at all. *See also Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1127 (1996).

II

THE "ENTANGLEMENT" PREMISE OF *AGUILAR* HAS BEEN REJECTED BY LATER CASES

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), this Court upheld the facial constitutionality of a federal funding program that enabled religious organizations to carry out secular objectives. The Court recognized that individual implementation of the funding program might result in impermissible governmental sponsorship of religious indoctrination. Nonetheless, the Court held that the

inclusion in the law of a policing mechanism whereby the Secretary of Health and Human Services may insure that funds are not used for the teaching of religious doctrine sufficed to overcome the constitutional difficulty.

The Court rejected the argument -- which prevailed in *Aguilar* — that the policing necessitated "excessive government entanglement with religion" in violation of the third prong of the test of *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). The Court noted that "the 'entanglement' prong of the *Lemon* test has been much criticized over the years." 487 U.S. at 616. While *Bowen v. Kendrick* purported to distinguish *Aguilar*, it effectively overruled the reasoning of that decision.

Subsequent decisions by the Court have also undermined the reasoning of *Aguilar*. In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995), this Court required a state university to provide equal funding for student speech expressed from a religious perspective as for secular student speech. Notwithstanding the possibility that funding might thereby be used for religious indoctrination, the Court did not invoke the *Aguilar* rationale and declare the funding impermissible on potential "entanglement" grounds. Nor did the Court see an "entanglement" problem in the federal funding of a sign-language interpreter who was attending classes with a student at a Roman Catholic high school. *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993). The Court said in *Zobrest* (509 U.S. at 10) that it is constitutionally permissible for government to offer

> a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion."

That description fits New York's Title I program that was invalidated in *Aguilar*. Under decisions of the Court that were rendered after *Aguilar*, including *Bowen v. Kendrick, Rosenberger, Zobrest, and Witters v. Washington Dep't of Service for Blind*, 474 U.S. 481 (1986), the secular aid provided to schoolchildren enrolled in sectarian schools under Title I now passes constitutional muster. It should be renewed with an overruling of *Aguilar*.

In *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994), three Justices of the Court expressed the view that *Aguilar* "should be overruled at the earliest opportunity." 512 U.S. at 750 (Scalia, J., dissenting, joined by the Chief Justice and Justice Thomas). Two other Justices said they thought it appropriate to "reconsider" *Aguilar*. 512 U.S. at 717 (O'Connor, J.), 731 (Kennedy, J.).

We conclude this brief with a reiteration of the concluding observations in our *amicus* brief in *Grand Rapids School District v. Ball*, No. 83-990, p. 6:

> We refuse to believe that the First Amendment to the United States Constitution, which was designed as a bulwark of religious liberty and a means of guaranteeing religious freedom in this Nation, prohibits public school authorities from utilizing the only effective means of delivering remedial and enrichment classes to the thousands of children who are receiving combined secular and religious educations because their parents have deep and abiding religious convictions. A Jewish parent who believes that it is an essential principle of his or her religious faith to teach the principles of Judaism diligently to

his or her children (*Deuteronomy* VI: 7) is not only asked, under this constitutional doctrine, to pay for the child's religious instruction and for the core secular program that is required for promotion and graduation under State law, but is also asked to relinquish all practical access to supplemental programs that public-school authorities are prepared to provide, *under their exclusive guidance and control*, on the premises of a private school. The Constitution does not, we submit, require this "cruel choice." See *Braunfeld v. Brown*, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting); *see also Widmar v. Vincent*, 454 U.S. 263 (1981). The result of the ruling below is, at the least, the kind of "callous indifference" to religious believers which this Court has said "was never intended by the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed. *Aguilar v. Felton* should be overruled.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

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Petitioners

v.

BETTY-LOUISE FELTON, *et al.*

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,
Petitioners

v.

BETTY-LOUISE FELTON, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF AMICUS CURIAE OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Knights of Columbus submits this brief amicus curiae in support of the petitioners. All parties to these cases have given their written consent to the participation of the Knights of Columbus, and copies of their written consent have been lodged with the Clerk pursuant to Rule 37.3(a) of the Supreme Court Rules.

The Knights of Columbus is a charitable Catholic family fraternal organization of close to 1.6 million members and their families, totaling nearly six million people. Founded in New Haven, Connecticut in 1882 by Father Michael J. McGivney, the Knights of Columbus has grown into an international organization with some 11,000 local councils located in all 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, Canada, Mexico, the Philippines and several other countries. The Knights of Columbus is the largest lay organization in the Roman Catholic Church.

Since its founding, the Knights of Columbus has been dedicated to several purposes: (i) rendering aid and assistance to its sick, needy and disabled members and their families; (ii) promoting social and intellectual discourse among its members and their families; (iii) promoting and conducting educational, charitable, religious, social welfare, war relief and public relief work; and (iv) maintaining a life insurance program for the benefit of its members, their beneficiaries and their families. Last year alone, the Knights contributed more than $105 million to charitable causes and provided roughly 50 million hours of volunteer service.

In addition, the Knights of Columbus has a long history of advocacy in this Court on issues of importance to the family and the Church, including issues involving religious liberty, church-state relations and parochial schools. For example, the Knights underwrote the litigation in *Pierce* v. *Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). The Knights of Columbus is a strong supporter of Catholic education; and many of its members send their children to parochial schools. The Knights of Columbus therefore has a strong interest in the Establishment Clause issues raised in these cases and in the overruling of *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

STATEMENT OF THE CASE

The Knights of Columbus adopts the statement of the case set forth in the brief of Petitioners Rachel Agostini, *et al.*, and wishes simply to underscore the following:

1. Title I remedial services are available to all children who are economically and educationally deprived, 20 U.S.C. §§ 6313, 6315(b), whether they attend public or parochial schools.

2. Title I funds in New York are used to teach remedial reading, math and English as a second language. No Title I funds are given directly to parochial schools.

3. Title I funds, which must be "secular, neutral, and nonideological," may only supplement, and not supplant, the services otherwise provided by the parochial school. 20 U.S.C. §§ 6322(b), 6321(a)(2).

4. Since this Court's decision in *Aguilar* v. *Felton*, *supra*, Title I services have been provided in alternative ways, including vans parked near parochial schools. These alternative methods already have cost New York more than $100 million.

SUMMARY OF ARGUMENT

The First Amendment prohibits the government from acting for certain purposes. The government may not purposefully suppress speech, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), or purposefully restrict the free exercise of religion, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 523 (1993), or purposefully advance "a religious cause." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2521-22 (1995).[1]

This Court consistently has held, however, that the unintended, incidental effects of governmental actions do

[1] The government may, of course, "act with the proper purpose of lifting a regulation that burdens the exercise of religion." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 328 (1987).

not violate the First Amendment. The government's actions may effectively burden speech. *Ward*, 491 U.S. at 791. Where unconnected to any other constitutional right, such as the right of parents to direct the education of their children, the government's actions may effectively restrict the exercise of religion. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990). The Establishment Clause similarly does not prohibit unintended, incidental benefits to religious institutions. *See, e.g., Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993). This Court has long held, for example, that parochial schools could benefit from "a general program under which [the state] pays the [bus] fares of pupils attending public and other schools." *Everson v. Board of Education*, 330 U.S. 1, 17 (1947). Because the class of beneficiaries was defined by the statute neutrally and without reference to religion, the fact that parochial schools benefited incidentally was not enough to violate the Establishment Clause. The government's purpose was to benefit all schoolchildren, and it could only satisfy that purpose by paying the bus fares of all schoolchildren, including parochial schoolchildren. The inevitable, foreseeable but unintended consequence of the government's purpose was to aid parochial schools, and the First Amendment was not violated.

In Establishment Clause cases, however, this basic First Amendment principle—that the unintended, incidental effects of governmental actions do not violate the Constitution—has had only inconstant application. This is ironic because the case for finding a constitutional violation among the incidental and unintended effects of a statute is even weaker under the Establishment Clause than under the Free Speech or Free Exercise Clauses. While the text of the First Amendment is consistent with a concern for incidental and unintended abridgment of speech or free exercise rights, an incidental and unintentional establishment of religion is an oxymoron. *Aguilar* nonetheless subjects the unintended, incidental effects of

governmental actions to a confusing and severe set of doctrines for which there is no parallel in free speech and free exercise cases. There is no sensible constitutional reason for treating unintended consequences under the Establishment Clause more severely than those under the Free Speech and Free Exercise Clauses. If the First Amendment does not prohibit truly incidental suppressions of speech or truly incidental restrictions of religious activity, it should not be read to prohibit truly incidental aid to religious activity.

The provision of Title I services on the premises of parochial schools is a case of unintended, incidental effects. The Title I program is constitutional, as this Court already has held. *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), *modified*, 422 U.S. 1004 (1975). Title I services are given to a broad, general class of beneficiaries—poor, remedial students—that is defined without reference to religion. Those services are purely secular and are given directly to the schoolchildren, not to the parochial schools. And, by statutory requirement, Title I can only supplement, not supplant, the curriculum provided by parochial schools. Any unintended, incidental benefit the parochial schools might gain from the provision of Title I services in their classrooms does not violate the Constitution.

ARGUMENT

In deciding First Amendment cases, whether under the Free Speech, Free Exercise or Establishment Clauses, this Court has focused on the government's purpose in acting; and, other than in *Aguilar*, it has not struck down a statute or program solely because of its unintended, incidental effects. There are many searching judicial devices for determining whether an effect is truly incidental; but that has been the crucial inquiry. A common principle of First Amendment cases is thus that the unintended, inci-

dental effects of governmental actions do not violate the Constitution. *Aguilar* fails to respect that common principle, and should be overruled.

I. UNINTENDED, INCIDENTAL EFFECTS OF GOVERNMENTAL ACTIONS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

From *Everson* to *Rosenberger*, the government's purpose in acting has been the central focus of Establishment Clause inquiry. The Establishment Clause requires courts to "inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation." *Rosenberger*, 115 S. Ct. at 2521.

To ensure that certain effects of governmental action are truly incidental, and not the result of "some ingenious device [adopted] with the purpose of aiding a religious cause," *id.*, at 2522, this Court has employed two principal devices. First, this Court has examined whether the class of beneficiaries is defined in a neutral way, without regard to religion. Second, this Court has examined whether the benefit flows to religious institutions because of the genuinely independent choices of private individuals. Neither technique of judicial inquiry is itself dispositive; both are meant to help determine whether an effect is truly incidental and thus whether the government has acted with a constitutional purpose.

A. Neutrality.

The text of a statute is the best expression of its purpose. When a statute defines a class of beneficiaries, the government's purpose is plainly to benefit that class as a class. This Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenu-

ated financial benefit." *Zobrest*, 509 U.S. at 8. See *Rosenberger*, 115 S. Ct. at 2521-22; *Witters* v. *Washington Dep't of Services for Blind*, 474 U.S. 481, 487-88 (1986); *Mueller* v. *Allen*, 463 U.S. 388, 397-400 (1983); *Widmar* v. *Vincent*, 454 U.S. 263, 274-75 (1981); *Walz* v. *Tax Com. of New York*, 397 U.S. 664, 673 (1970); *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); *Everson*, 330 U.S. 1, 17.[2]

"The purpose, or justification, of a regulation will often be evident on its face." *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2459 (1994). But not always. This is the problem of "sham" purposes.[3] When examining a statute, courts insist on more than a facial neutrality; substantive neutrality is required as well. *Board of Ed. of Kiyras Joel Village Sch. Dist.* v. *Grumet*, 114 S. Ct. 2481, 2490 (1994); *Hialeah*, 508 U.S. at 533-34. A truly neutral class of beneficiaries is the strongest evidence of the government's constitutional purpose.

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[2] This Court's emphasis on content-neutral regulations in free speech cases is analogous to the requirement of neutrality in Establishment Clause cases. If a statute limiting speech is written in terms of the content of speech, then the conclusion is almost inescapable that its purpose is to limit what can be said. See *Turner Broadcasting Sys.*, 114 S. Ct. at 2459; *Schacht* v. *United States*, 398 U.S. 58 (1970). A focus on whether a statute is by its terms "content-neutral" is an opening effort to scrutinize the words of the statute to make sense of the government's object or purpose in legislating. Similarly, in the free exercise context, there are "many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Hialeah*, 508 U.S. at 533-34.

[3] See *Wallace* v. *Jaffree*, 472 U.S. 38, 64 (1985) (Powell, J., concurring) ("a law will not pass constitutional muster if the . . . purpose articulated by the legislature is merely a 'sham' "); *Arcara* v. *Cloud Books Inc.*, 478 U.S. 697, 707 n.4 (1986) (O'Connor, J., concurring) (calling them "pretext[s]").

B. Independence.

If a religious institution benefits from governmental aid solely because of the "genuinely independent and private choices" of those actually receiving the aid, *Witters*, 474 U.S. at 487, the government is unlikely to harbor the hidden purpose of advancing religion. The fact that aid is given directly to students, parents or some other third party is thus another prominent indication that an indirect benefit flowing to parochial schools is truly an unintended, incidental effect, and not the government's hidden purpose. See, *e.g.*, *Rosenberger*, 115 S. Ct. at 2523 (payment made to third party); *Zobrest*, 509 U.S. at 9 (aid given directly to family); *Witters*, 474 U.S. at 487 (aid given directly to student); *Mueller*, 463 U.S. 401 (tax deduction given to parents).

Courts often test the government's purpose by examining what the statute actually permits or requires. "[T]he effect of a law in its real operation is strong evidence of its object." *Hialeah*, 508 U.S. at 535. Certain kinds of direct and substantial governmental aid to parochial schools, for example, have sometimes been considered evidence of a purpose to advance religion. In some cases, "direct grants of governmental aid" that relieve parochial schools of "costs they otherwise would have borne in educating their students" have been found unconstitutional. *Zobrest*, 509 U.S. at 12. Where, for example, the government "tak[es] over a substantial portion of [a parochial school's] responsibility for teaching secular subjects"—including courses in art, music and physical education—the government has provided what amounts to an unconstitutional "direct cash subsidy to the religious school." *Ibid.* (citing *Sch. Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985)). And the same might be true if the government were to directly give such schools "massive aid" in the form of teaching material and equipment. *Id.* (citing *Meek* v. *Pittenger*, 421 U.S. 349 (1975)).

C. The Provision of Title I Remedial Services In Parochial School Classrooms Is Constitutional.

The provision of Title I services to poor, remedial students on the premises of parochial schools satisfies the Establishment Clause because it is a neutral, independent grant of aid to schoolchildren. Under Title I, all schoolchildren who need help with math and reading are given instruction in those subjects from public employees, and by statute that instruction cannot replace what is provided in the student's parochial school. Any attenuated benefit to the parochial schools from the provision of Title I services in their classrooms is unintended, incidental and so perfectly constitutional. That should end the matter.[4]

II. ALONE AMONG FIRST AMENDMENT CASES, *AGUILAR* STRUCK DOWN A LEGISLATIVE PROGRAM BECAUSE OF ITS UNINTENDED, INCIDENTAL EFFECTS.

Aguilar stands alone, in defiance of the basic First Amendment principle that unintended, incidental effects do not violate the Constitution. Instead of employing that basic principle, which the Establishment Clause shares with the Free Speech and Free Exercise Clauses, *Aguilar* went its own way; it adopted what might be called a constitutional consequentialism, in which the incidental effects of governmental actions are seen as themselves posing independent constitutional problems.

Effects resonate. They are never neutral. Consequentialists are thus forever facing how they might, in a principled way, separate constitutional effects from unconstitutional ones. Clearly, not all governmental actions that effectively aid religion are unconstitutional. *Zobrest,*

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[4] There can be no endorsement of religion where a governmental action provides only an incidental benefit to religion. No one endorses what is truly unintended and incidental. See *Capitol Square Review & Advisory Bd.* v. *Pinette*, 115 S. Ct. 2440, 2447-48 (1995) (plurality).

509 U.S. at 8. State provision of police and fire protection effectively aids religion, yet no one argues that they are unconstitutional. *Everson*, 330 U.S. 1. Tax exempt status for churches effectively aids religion. *Walz*, 397 U.S. 664. Tax deductions for parochial school tuitions, transportation and textbooks effectively aid religion. *Mueller*, 463 U.S. 388. State-paid interpreters and state-paid printing of religious material effectively aid religion, too. *Zobrest*, 509 U.S. 1; *Rosenberger*, 115 S. Ct. 2510. And yet these and other unintended, incidental effects of governmental actions are plainly constitutional. *Aguilar*'s consequentialism cannot adequately explain those cases; and its logic is flatly inconsistent with them.

A. Unintended, Incidental Effects in Free Speech and Free Exercise Cases.

This Court's free speech and free exercise precedents hold that the unintended, incidental effects of governmental actions do not violate the Constitution. The same should be true in Establishment Clause cases.

1. *Free Speech.*

In free speech cases, the "government's purpose is the controlling consideration." *Ward*, 491 U.S. at 791. In *Ward*, New York City passed regulations designed to protect residents near the band shell in Central Park from excessive noise; those regulations obviously and inevitably had a speech-limiting effect on those performing in the band shell. This Court held the regulations constitutional, as incidental restrictions of speech. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* (citations omitted). See *Turner Broadcasting Sys.*, 114 S. Ct. at 2469; *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968).

Ward also held that the government's incidental effect on speech need not be the least restrictive possible. While it must be "narrowly tailored to serve the government's legitimate content-neutral interests," a time, place or manner regulation "need not be the least-restrictive or least-intrusive means of doing so." *Ward*, 491 U.S. at 798-99. The less restrictive means test is meant to make sense of the government's purpose in acting—by asking if that purpose would be more (or less) complete if the speech-limiting effects did not attend it; and that sort of test does not require the least possible effect of governmental action on speech.

2. *Free Exercise.*

In free exercise cases, "the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Hialeah*, 508 U.S. at 523. As with other First Amendment provisions, the central concern of the Free Exercise Clause is the government's purpose in acting. The point was made dramatically in *Employment Div.* v. *Smith*, 494 U.S. 872. Oregon criminalized the use of various drugs, including peyote. Smith, a member of the Native American Church, smoked peyote at one of the Church's religious ceremonies. This Court upheld Oregon's criminal law as imposing only an "incidental effect" on Smith's religious activity, even though it burdened the exercise of his religion: "if prohibiting the exercise of religion . . . is not the object of [a general law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment is not offended." 494 U.S. at 878.

Whether or not one agrees with the holding of *Smith*, and many do not,[5] its logic is clear: where no other con-

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[5] The common object of the Religion Clauses is religious liberty, and there is thus good reason to scrutinize incidental burdens on religious exercise more severely than incidental aid to religious institutions. Taken together, however, *Smith* and *Aguilar* do just

stitutional right is implicated, the First Amendment is not violated so long as the object or purpose of a generally applicable law is constitutional—even if the unintended effect of that law is incidentally to burden one's religious activity. The Court's focus on the government's purpose is evident from its care in noting that there had been no suggestion by either party that the government was seeking to satisfy any hidden unconstitutional purpose through the application of the law. 494 U.S. at 882. The *Smith* court also noted that the government would violate the Free Exercise Clause "if it sought to ban acts or abstentions only when they are engaged in for religious reasons or only because of the religious beliefs they display." *Id.* at 877. In such cases, one could only conclude that the government's purpose was to restrict religious activity.

Similarly, in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439 (1988), the Court held that the government's construction of a road through a national forest that traditionally had been used by American Indian tribes for religious activity did not violate the Free Exercise Clause. This Court acknowledged that the road's construction "could have devastating effects on traditional Indian religious practices," but considered these to be "incidental effects." *Id.* at 451. The Court stressed, however, that "the Government has taken numerous steps . . . to minimize the impact that construction of the G-O road

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the opposite—and religious liberty loses twice. For its part, *Smith* examined only the formal neutrality of Oregon's statute, which was neutral only in the sense that laws forbidding people to sleep under bridges are formally neutral. Oregon refused to grant an exemption for the sacramental use of peyote (or, in another era perhaps, sacramental wine) for no articulable reason; its religion-neutral interests would have been served as equally with such an exemption as without. A governmental action that "visits gratuitous restrictions on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Hialeah*, 508 U.S. at 538 (citation omitted).

will have on the Indians' religious activity." *Id.* at 454. The government sought to satisfy its purpose with a minimal effect on Indian religious practices. That was good evidence that the government's purpose was constitutional and that its effects were truly unintended and incidental.

B. *Aguilar* and the False Problem of Unintended, Incidental Effects in Establishment Clause Cases.

The fundamental mistake of *Aguilar* is that it sees a constitutional problem where none exists. The unintended, incidental effects of governmental actions—like those produced by the provision of Title I services in parochial school classrooms—do not violate the Establishment Clause, even if they effectively advance religion. Acknowledging Title I's "well-intentioned efforts," *Aguilar* nonetheless built a structure of doctrines because it feared the mere possibility of an unintended consequence: "the infiltration of religious thought" in Title I instruction. 473 U.S. at 413. But the Constitution simply does not prohibit the government from effectively aiding religion, any more than it prohibits the government from effectively limiting speech.

The various and novel aspects of *Aguilar*—political divisiveness, administrative entanglement, the "excessive entanglement" produced by the "ongoing inspection" of Title I's public employees—are alternative devices for preventing the government from effectively aiding religion. *Ibid.* at 412-14. Those devices (or something like them) will last as long as the Court considers its task under the Establishment Clause to be weighing up the good and bad states of affairs that effectively aiding religion might be said to contain.

Aguilar's doctrine of "excessive entanglement" represents the highwater mark of a misguided focus on incidental and unintended effects. It has been the consequentialist trump card. Of course, "excessive entangle-

ment" has trumping power only because, as Chief Justice Rehnquist has pointed out repeatedly, it is a "Catch 22" argument: the Constitution will not allow various forms of unintended, incidental aid to parochial schools without "ongoing supervision" of their use; and the intense scrutiny of this required supervision itself violates the Constitution. *Wallace* v. *Jaffree*, 472 U.S. 38, 109-110 (1984) (Rehnquist, J., dissenting). Under *Aguilar*, the Constitution requires what the Constitution forbids. This is the *reductio ad absurdum* of a misguided focus on unintended effects. To avoid the constitutional problems created by conveying unintended benefits one must engage in extensive monitoring (after all, unintended and incidental benefits are much more difficult to detect than overt and substantial ones), only to be told that even if the monitoring succeeds, the program will be declared unconstitutional on the entanglement prong.

The real problem of *Aguilar*, however, is not its bizarre doctrinal innovations, but its mistaken sense that such devices are needed. They are not. The unintended, incidental effects of governmental action do not violate the Constitution.

III. *Aguilar's* On-Premises/Off-Premises Distinction Has No Constitutional Significance and Should Be Overruled.

The Constitution is not a parking code. And yet, under *Aguilar*, federal courts unanimously have held that the government may provide Title I services to parochial school students in vans parked just over the fringe of parochial school property, but not on the school's property or in its own classrooms. See *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Board of Educ.* v. *Alexander*, 983 F.2d 745 (7th Cir. 1992); *Barnes* v. *Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido* v. *Cavazos*, 934 F.2d 912 (8th Cir. 1991). At the barest minimum, this Court should end that sort of

line-drawing. Requiring the provision of Title I services off the premises of parochial schools is costly, disruptive and pointless. Indeed, "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Zobrest*, 509 U.S. at 13. This Court already has approved the provision of health services, diagnostic speech and hearing services and sign-language interpreters on the premises of parochial schools. *Id.* at n.10 (citations omitted). If public employees may constitutionally translate the homily during Mass at Salpointe Catholic High School for a parochial school student, *id.* at 19 (Blackmun, J., dissenting), they surely can teach remedial math and reading to Title I students in their own classrooms.

CONCLUSION

Aguilar should be overruled. And in doing so, this Court should make clear that, as with other provisions of the First Amendment, the unintended, incidental effect of advancing religion does not violate the Establishment Clause. The judgment of the Court of Appeals should be reversed and the case remanded with instructions to vacate the injunction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

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Respondents.

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BRIEF *AMICUS CURIAE* OF UNITED STATES SENATOR ROBERT F. BENNETT IN SUPPORT OF PETITIONERS

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EDITOR'S NOTE

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BRIEF *AMICUS CURIAE* OF UNITED STATES SENATOR ROBERT F. BENNETT IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, Senator Robert F. Bennett submits this brief *amicus curiae* in support of Petitioners. Consent to the filing of this brief has been granted by all parties. Copies of the letters of consent have been lodged with the Clerk.

This case raises momentous questions regarding the status and future direction of Establishment Clause jurisprudence. As a Member of the United States Senate, Senator Bennett has a keen interest in the evolution of legal doctrine that affects the rights of religious individuals and religious institutions in American society. We believe this perspective will complement the briefs of the parties and assist the Court in the proper resolution of this case.

SUMMARY OF ARGUMENT

Although *Lemon v. Kurtzman* today stands as a controversial symbol of government hostility to religion, its three conceptual prongs were not intended to prohibit government aid to religion or to enforce the separation of church and state. Rather, this analytical framework was designed to protect "religious voluntarism"— the idea that individual religious choice should be insulated from the influence of noncoercive government action that encourages or discourages religious belief or activity. "Secular purpose" and "primarily secular effect," for example, were well established doctrinal elements of Establishment Clause jurisprudence prior to *Lemon*, and were consistently applied to protect religious voluntarism. In the single pre-*Lemon* decision in which it was used, the relatively new concept of "entanglement" was likewise employed to protect religion from government, *not* government from religion. Even the Court's post-*Lemon* decisions permit substantial financial and in-kind aid to religion so long as such aid does not bias the choice between religion and nonreligion.

Entanglement analysis went wrong almost from its initial use in *Lemon*, threatening religious voluntarism without offering any compensating protection. Instead of being deployed to protect individual religious choice, entanglement has become an independent constitutional value that has calcified the division between church and state, even when the separation undermines

voluntarism. The consequences of this doctrine gone awry are gravely disturbing. Entanglement is routinely used to deny religious individuals and organizations equal access to social benefits in violation of the religious neutrality otherwise mandated by the Court's Establishment Clause jurisprudence. Entanglement exacerbates the tension between the Free Exercise and Establishment Clauses by casting doubt on the legitimacy of exemptions obtained by individuals and organizations through the political process. Moreover, entanglement ironically leads to discrimination on the basis of religion in violation of the Equal Protection Clause of the Fourteenth Amendment. Finally, entanglement deprives religious individuals and organizations of fundamental political and associational rights protected by the First Amendment.

The tragedy in all of this is that entanglement analysis has such negative consequences while contributing so little to Establishment Clause jurisprudence. In many cases, entanglement merely mimics the protection of religious voluntarism offered by the purpose and effect prongs of *Lemon*. It avoids analytic redundancy only by relying on caricatures of religious schools that are frequently unsupported by the factual record, and engaging in standardless judgments based on hypothetical facts. The case at bar vividly illustrates the dangers of applying entanglement as a test of Establishment Clause constitutionality independent of religious voluntarism. In light of its deficiencies, the entanglement prong should be dropped as a test of constitutionality under the Establishment Clause.

ARGUMENT

I. THE THREE-PRONGED TEST OF *LEMON V. KURTZMAN* WAS DESIGNED TO PROTECT RELIGIOUS VOLUNTARISM, NOT TO PROHIBIT ALL GOVERNMENT AID TO RELIGION OR TO ENFORCE THE SEPARATION OF CHURCH AND STATE AS AN INDEPENDENT VALUE.

Religious voluntarism is the principle that the popularity and vitality of any religious activity should depend on the intrinsic attractions of the activity to its adherents, and not on the extrinsic effects of government encouragement or opposition. Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968). A doctrinal regime committed to religious voluntarism seeks to "minimize the effect [government] has on the voluntary, independent religious decisions of the people as individuals and in voluntary groups." Thomas Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 695, 706 (forthcoming March 1997); *accord*, Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990).

This Court has long recognized that religious voluntarism is the fundamental purpose of the religion clauses.[1] A commitment to

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[1] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (The purpose of the religion clauses "is to insure that no religion be sponsored or favored, none commanded, and none inhibited."); Zorach v. Clauson, 343 U.S. 306 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one [religious] group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."); Engel v. Vitale, 370 U.S. 421, 429 (1962) ("[E]ach separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for

religious voluntarism is also the undoubted source of the Court's insistence that government remain neutral with respect to the religious choices of its citizens,[2] because "neutrality reduces (and in theory eliminates) the impact that governmental action has upon individual choice with respect to religion." Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 11 (1989); *see also Walz*, 397 U.S. at 696 (Harlan, J., concurring) (Government action that "neither encourages nor discourages religion . . . satisfies the voluntarism requirement of the First Amendment.").

Religious voluntarism is violated by government persuasion as much as by government coercion. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1002 (1990). Thus, whereas the Free Exercise Clause protects individual religious choices from purposeful religious coercion by government, *see, e.g., Church of the Lakumi Babylu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Establishment Clause protects these choices from government actions that have the purpose or primary effect of encouraging or discouraging religion, even when the government has not used its coercive power directly to mandate or to prohibit religious belief or practice. *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962).

A. Prior to their incorporation into the *Lemon* test, "secular purpose" and "primarily secular effect" were well-established doctrinal tests meant to protect religious voluntarism.

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religious guidance.").

[2] *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373, 382 (1985); Everson v. Board of Educ., 330 U.S. 1, 14-15, 15-16 (1947).

Although *Lemon v. Kurtzman* was the first decision of the Court to combine secular purpose, primarily secular effect, and entanglement into a single test, *see* 403 U.S. 602, 612-13 (1971), only entanglement was a new analytical concept, having been articulated just the preceding Term. *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). By contrast, a full eight years before *Lemon*, the Court had synthesized its entire body of Establishment Clause precedent since *Everson* into the requirement that government action have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (*citing McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Everson v. Board of Educ.*, 330 U.S. 1 (1947). *Board of Education v. Allen* approved *Schempp*'s test of constitutionality under the Establishment Clause, 392 U.S. 236, 242-43 (1968), and *Lemon* cited *Allen* as authority for adopting purpose and effect as two of its three doctrinal prongs. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

1. Prior to *Lemon*, secular purpose and primarily secular effect were consistently applied to insulate individual religious choice from the influence of noncoercive government action.

The three pre-*Lemon* decisions that found violations of the Establishment Clause all involved public school programs which encouraged but did not require student participation in religious teaching or practice. In *McCollum v. Board of Education*, the Court invalidated a program which authorized priests, ministers, and rabbis to use public school classrooms for religious instruction of interested students, finding that even voluntary on-campus religious instruction impermissibly relied on compulsory education laws to assist religious groups in the propagation of their faith. 333 U.S. 203, 209-10 (1948). In *Engel v. Vitale*, the Court found that classroom recitation of a state-authored prayer

at the beginning of each school day was "wholly inconsistent" with the Establishment Clause, even though students could choose not to participate. 370 U.S. at 421, 423 & n.2, 430. "The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American public can say. . . ." *Id.* at 429. In *Abington School District v. Schempp*, the Court invalidated formal classroom recitations from the Bible, again deeming it irrelevant that students were excused from participating in the exercises. 374 U.S. 203, 223-25 (1963). The Court found that even in the absence of direct coercion, Bible reading could not plausibly be characterized as having a primarily secular effect that neither aided nor opposed religion. *Id.* at 223.

Decisions of the Court upholding programs of assistance to religion prior to *Lemon* were also principally concerned with preserving religious voluntarism. *See, e.g., Board of Education v. Allen*, 392 U.S. 236, 243-44 (1968) (textbook loan program benefitting religious school students did not violate the Establishment Clause because books were provided free of charge to all students upon their request, regardless of the public, private, or religious character of their schools); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (state authorization of voluntary off-campus released-time religious instruction was merely permissible state cooperation "in a religious program to the extent of making it possible for . . . students to participate in it.").

2. The single pre-*Lemon* decision that employed the concept of entanglement likewise focused on the protection of individual religious choice from noncoercive government action.

Walz v. Tax Commission held that property tax exemptions for churches were consistent with the Establishment Clause because exemptions minimized church-state "entanglement"— that is, the government interference in religious practice that would inevitably result from "tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of these legal processes." 397 U.S. 664, 674 (1970). The chief rationale was the curtailment of religious liberty that historically has accompanied taxation of churches. *Id.* at 673. In *Walz*, entanglement was envisaged as preventing government's use of the "regulatory strings attached to powerful financial benefits" to exercise control over a religious group's "beliefs, policies, or actions." Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV 311, 346 (1986).

C. The Court's post-*Lemon* decisions permit substantial financial and in-kind aid to religion so long as such aid does not bias the choice between secular public schools and private religious schools.

1. Indirect aid to religious schools and other "pervasively sectarian" institutions is permissible if directed to students and their parents pursuant to broad, secularly defined benefit categories.

The Court has long presumed that religious elementary and secondary schools exist primarily to inculcate their students with the beliefs of the sponsoring faith, and thus that the sponsor's religious beliefs and practices pervade every aspect of the schools' activities. *See, e.g., Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 379 (1985); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 613, 615-16, 620 (1971). Accordingly, the Court has generally held that financial

or in-kind aid given directly to religious schools and other such "pervasively sectarian" institutions advances religion in violation of *Lemon*'s primary secular effect prong. *See, e.g., Grand Rapids*, 473 U.S. at 385; *Meek*, 421 U.S. at 366; *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 779-80 (1973). By contrast, when aid is given directly to religious school students or their parents pursuant to broad, secularly defined classes, the Court has generally found no Establishment Clause violation. *See, e.g., Zobrest v. Catalina Hills School Dist.*, 509 U.S. 1 (1993); *Mueller v. Allen*, 463 U.S. 388 (1983); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *cf. Witters v. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (declining to invalidate state vocational rehabilitation assistance used by a visually handicapped student to study for the ministry at a Bible college).

Even though aid to students and parents obviously assists any religious school which the students might attend, the Court's opinions make clear that such aid does not result in a primary effect of advancing religion, because the aid is received by religious schools only as the result of the individual religious choices of students and parents. *See, e.g., Zobrest*, 509 U.S. at 10, 13-14; *Mueller v. Allen*, 463 U.S. 388, 399-400 (1983); *cf. Witters*, 474 U.S. at 487, 488 (when recipient of state vocational rehabilitation assistance chooses to study for ministry at Bible college, the college benefits only as the result of the recipient's religious choice).

In sum, although financial and in-kind assistance to students attending private religious schools benefit these schools, such assistance does not violate the Establishment Clause because the schools receive the benefits only as individual recipients choose to attend them. In these circumstances, financial or in-kind aid funds the private choices of individuals (including religious individuals), and only incidentally the educational institutions

(including religious schools) that are the beneficiaries of these choices. *See* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 585 (1968). As demanded by religious voluntarism, this ensures that religious schools and other pervasively sectarian institutions in the United States exist as the consequence of the private choices of religious individuals rather than the collective choices of government.

2. Direct aid to religious schools and other pervasively sectarian institutions is permissible so long as there is no possibility that such aid could be diverted to encourage religious belief or practices.

Although the Court regularly emphasizes the importance of the individual-institutional distinction to the constitutionality of religious school aid programs, *e.g.*, *Mueller v. Allen*, 463 U.S. 388, 399 (1983); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 780-81 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971); *Board of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968), it nevertheless has upheld both cash and in-kind assistance given directly to religious schools when there is no possibility that the aid could be used to promote religious belief or practice. *Wolman v. Walter*, 433 U.S. 229 (1977), considered, among other programs, a state's practice of administering and grading required achievement tests free of charge for religious school students. The Court held that since the religious schools controlled neither the content of these tests nor their results, the tests could not be used to teach religion in violation of the primary effect prong; and that, correspondingly, there was no need for close government monitoring of religious school teaching that would violate the entanglement prong. *Id.* at 240-41.

In *Committee for Public Education v. Regan*, 444 U.S. 646 (1980), the Court even upheld cash reimbursements to religious schools for expenses incurred in using their own employees to administer and grade state-mandated tests. The Court again concluded that these tests could not be used to teach religion because state employees prepared them and the objective nature of the test questions ensured that religious considerations would not influence grading. *Regan*, 444 U.S. at 654-56 (*quoting Wolman v. Walter*, 433 U.S. 229, 240 (1977)). The Court further held that record-keeping and reporting requirements mandated by the program would ensure that reimbursements were made only for secular services, and that these requirements did not constitute an excessive entanglement of the state with religious schools. 444 U.S. at 659-61.

3. Direct aid to religious colleges and other "nonpervasive" religious institutions is permissible when it is part of a secular social welfare program.

In religiously sponsored colleges the secular goal of teaching critical thinking by secular academic methods is thought to eclipse the religious goal of inculcating sectarian beliefs and practices. *See Roemer*, 426 U.S. at 750, 751 (plurality opinion); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971) (plurality opinion). Additionally, the relative age and maturity of college students compared to students in elementary and secondary schools makes it unlikely that college students will be manipulated into adopting particular religious beliefs or practices encouraged by a religious college. *See Roemer v. Maryland Bd. Pub. Works*, 426 U.S. 736, 750 (1976) (plurality opinion); *Tilton*, 403 U.S. at 685-86 (plurality opinion). For both of these reasons, the Court has concluded that, in contrast to religious elementary and secondary schools, religious colleges are generally not "pervasively sectarian." *Roemer*, 426 U.S. at 758-59 (plurality opinion); *Tilton*, 403 U.S. at 681, 687 (plurality

opinion). *See also Bowen v. Kendrick*, 487 U.S. 589, 610-11 (1988) (Adolescent Family Life Act did not facially violate Establishment Clause by permitting grants to religiously sponsored social service agencies along with secular agencies, when only a small percentage of eligible grant recipients were likely to be "pervasively sectarian."

In upholding the constitutionality of financial aid to religious colleges, the Court emphasized the pervasiveness of government aid in contemporary society. *See, e.g., Roemer*, 426 U.S. at 745 (plurality opinion). If most colleges are receiving government aid, neutrality does not require that otherwise eligible religious colleges be denied aid solely because of their religious affiliation.[3]

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[3] *Roemer*, 426 U.S. at 747 (plurality opinion); *cf. Bowen*, 487 U.S. at 595-96, 608-09 (federal law authorizing cash grants to religious as well as secular social service agencies for pregnancy counseling does not violate establishment clause because "nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution"); Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970) (property tax exemption for churches "along with nonprofit hospitals, art galleries, and libraries" was equivalent to supplying churches the same police and fire protection provided to everyone else). *See also* Board of Educ. v. Grumet, 114 S.Ct. 2481, 2491 (1994) ("[W]e have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges."); Zobrest v. Catalina Hills School Dist., 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."); Board of Educ. v. Allen, 392 U.S. 236, 242 (1968) ("[T]he Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation. . . ."); Everson v. Board of Educ., 330 U.S. 1, 16 (1947) ("[The state] cannot exclude individual Catholics, Lutherans, Mohammedans, or members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.")

II. "ENTANGLEMENT" ANALYSIS THREATENS RELIGIOUS VOLUNTARISM AND OTHER FUNDAMENTAL CONSTITUTIONAL VALUES WITHOUT OFFERING ANY COMPENSATING PROTECTION.

The Court has distinguished two kinds of church-state entanglement which run afoul of the Establishment Clause. "Administrative" or "institutional" entanglement describes church-state relationships in which the government monitoring thought necessary to ensure that government aid not be used to advance religion, is itself so intrusive as to constitute an independent violation of the Establishment Clause. Edward McGlynn Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205, 211 (1980). Government monitoring of teachers in religious elementary and secondary schools to ensure that they are not advancing religion is the paradigm case of excessive administrative entanglement. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *Meek v. Pittenger*, 421 U.S. 349, 369-70 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 617-19, 620-22 (1971). In fact, the Court has never found excessive administrative entanglement to exist outside the context of financial aid to religious schools.

"Political" entanglement describes church-state relationships likely to cause "[p]olitical fragmentation and divisiveness on religious lines." *Lemon*, 403 U.S. at 623. Cash subsidies to parochial schools are thought to create political entanglement because of the risk of yearly budget battles in which political opponents are distinguished principally by denominational affiliation or lack thereof. *Id.* at 622. The Court has confined political entanglement to cases involving direct cash subsidies to religious schools or their teachers, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 n.17 (1987); *Mueller v.*

Allen, 463 U.S. 388, 403 n.11 (1983), and has further suggested that it is not an independent test of constitutionality under the Establishment Clause. *See Lynch*, 465 U.S. at 684-85; *id.* at 689 (O'Connor, J., concurring).

A. The development of entanglement as an independent test of constitutionality has threatened religious voluntarism and legitimized violation of the fundamental constitutional rights of religious individuals and groups.

Numerous commentators have observed that the "separation of church and state" is not an independent constitutional value, but merely a means by which religious liberty is protected. *See, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 107 (1993); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 67 (1995). Voluntarism is thus a more fundamental constitutional value than separation. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, §14-11, at 1160 (2d ed. 1988); *cf.* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 67 (1995) ("[R]eligious liberty is considered *more fundamental* than nonestablishment.") Indeed, the Court has affirmed that religious voluntarism is the fundamental purpose of the Establishment Clause,[4] while rejecting the notion that total separation of church and state is either possible or desirable.[5]

Consistent with this view of voluntarism as the fundamental Establishment Clause value, *Walz* envisaged entanglement

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[4] *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); Zorach v. Clauson, 343 U.S. 306, 312 (1952); Engel v. Vitale, 370 U.S. 421, 429 (1962).

[5] *E.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 760 (1973); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), *quoted with approval in* Lynch v. Donnelly, 465 U.S. 668 (1984); *Walz*, 397 U.S. at 670; *Zorach*, 343 U.S. at 312, *quoted with approval in Walz*, 397 U.S. at 669.

analytic tool for identifying situations in which the choices of religious individuals and organizations might be exposed to the distorting influence of government encouragement or discouragement of religion. *See* Part I.A.2 *supra*. *Lemon*, however, cut entanglement loose from its mooring to voluntarism. Freed from that constraint, entanglement developed as a doctrine that enforces church/state separation not simply independent of religious voluntarism, *but at its expense*. In the name of "separation of church and state," entanglement has devalued religious voluntarism and legitimized government deprivation of religious liberty and other fundamental constitutional rights of religious individuals and groups.

1. In a modern welfare state, use of administrative entanglement to deny government aid to religious schools violates the religious neutrality mandated by the Establishment Clause.

Two hundred years ago, when government taxation and subsidies were uncommon and insignificant, merely separating church and state was a viable strategy for achieving religious neutrality. Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 639 (1995). A constitutional doctrine that preserved religious neutrality by prohibiting aid to both religion and nonreligion was eminently feasible "in a country with no public education, no public transportation, no public health and safety programs — in short, a libertarian, caretaker state." John Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 99 (1986). Neutrality meant simply leaving religion alone, neither taxing it nor subsidizing it. Esbeck, 70 NOTRE DAME L. REV. at 639; Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 522 (1968).

In an age, however, when our government taxes and funds virtually every aspect of American life, "simply leaving religion alone" imposes disproportionate financial burdens on religious beliefs and practices, violating religious neutrality and undermining religious voluntarism. Esbeck, 70 NOTRE DAME L. REV. at 639; Giannella, 81 HARV. L. REV. at 525-26; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990); Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 11 (1989). "Older views stressed governmental abstention as a condition (if not the substance) of freedom, [b]ut increasingly, affirmative governmental intervention is invoked to provide resources and opportunities for desired freedoms." Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 216, 268.

In the modern welfare state that the United States has become, many persons and entities receive some kind of government aid. Religious neutrality requires that this aid not be denied to otherwise qualified recipients simply because they are religious. "[R]eligious organizations should be able to compete on the same grounds as other groups . . . they should not, on Establishment grounds, be relegated to second-class status." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 121 (1993). To deny aid to otherwise qualified religious recipients constitutes a tax on religious exercise which undermines voluntarism by skewing private choice away from religion. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 355 (1986).

This is particularly the case with respect to elementary and secondary education in the United States. Public schools are supported by local tax dollars supplemented, in most cases

substantially, by state and federal grants. Parents of religious school students are not permitted to opt out of paying these taxes, and in very few states are they entitled to any tax relief, despite the fact that they save local, state, and federal governments thousands of dollars by educating their children privately. Jesse Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 285 (1968); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 844 (1984); McConnell & Posner, 56 U. CHI. L. REV. at 24; Paulsen, 61 NOTRE DAME L. REV. at 359. Government aid to private religious schools is merely a modest attempt to readjust the tax burden of education costs between those parents who desire a public secular education for their children, and those who desire a religious education but are compelled through taxation to pay for the public education their children do not use. Johnson, 72 CALIF. L. REV. at 822; Paulsen, 61 NOTRE DAME L. REV. at 356, 358 & n.210. Genuine neutrality between religious schools and public schools — between "religion and nonreligion" — requires that religious schools be apportioned a share of educational tax dollars reflecting the secular value of the education they supply. If most schools receive government aid, then religiously neutral funding requires that religious schools be eligible to receive it as well. Giannella, 81 HARV. L. REV. at 572, 575; Johnson, 72 CALIF. L. REV. at 845.

Administrative entanglement, however, functions to prevent religious schools from receiving most forms of direct aid from the government, by making it impossible for direct aid to satisfy the *Lemon* test. If government aid comes without any monitoring procedures to ensure that the aid will not be used to advance the religious mission of the religious school recipients, it will almost certainly be held to violate the primary secular effect prong of *Lemon*. *See, e.g., Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 386 (1985); *Leavitt v. Committee for Pub. Educ.*, 413 U.S.

472, 479-80 (1973). If, on the other hand, a means is provided to guarantee that government aid will not be used to advance the religious mission of the recipients, it will almost certainly be held to constitute excessive administrative entanglement. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985). Although *Regan* and *Wolman* held that direct aid to religious schools is constitutional when the aid does not support and cannot be diverted to the religious mission of the school, "the entanglement prong ensures that in most cases this very showing will result in a violation of the Establishment Clause." FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 52 (1995). However this state of affairs might be characterized, it is not neutral as between religion and nonreligion.

2. Entanglement exacerbates the tensions between the Free Exercise and Establishment Clauses by placing in question the constitutional legitimacy of exemptions obtained by religious individuals and groups through the political process.

Even as it abandoned the doctrine of judicially mandated exemptions for religion under the Free Exercise Clause, the Court affirmed the constitutionality of permissive exemptions — legislative and administrative exemptions granted to religious individuals and organizations even though the Free Exercise Clause does not require them. *Board of Educ. v. Grumet*, 114 S.Ct. 2481 (1994); *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); *see also Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (Title VII exemption for religious employers does not violate Establishment Clause). However, taking account of government-imposed burdens on religion unavoidably entangles government with religion; "a government that is not to some extent 'entangled' with religion is one that is indifferent to it." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 130 (1992); *accord* Donald Gianella,

Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement, 1971 SUP. CT. REV. 147, 171.

The entanglements entailed in crafting permissive exemptions are not trivial. Government officials necessarily must evaluate whether allegedly burdened religious conduct is in fact burdened; whether such conduct, if burdened, is in fact religious; whether such conduct, if religious, is deserving of an exemption from a general law; and whether an exemption for such conduct, even if deserved, is feasible in light of the legitimate goals of the law in question. Just as the need for government assistance may tempt parochial schools to compromise their religious missions to qualify for government assistance, so the need to convince government officials of burden, religiosity, sincerity, and feasibility may tempt any religious person or group to compromise religious beliefs or practices. Yet, if such evaluations by government were to be prohibited by entanglement, exemptions, if not eliminated altogether, would be limited to "long-established churches whose religiosity [is] universally conceded." Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 682-83 (1980). In that instance, new, unusual, or unpopular churches would find themselves unable to obtain such exemptions at all.

3. Administrative entanglement constitutes discrimination on the basis of religion in violation of the Equal Protection Clause of the Fourteenth Amendment.

Suspicion of government action that classifies on the basis of religion is rooted in the very origins of modern equal protection doctrine. *See United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (questioning the validity of the "presumption of constitutionality" in case of "statutes directed at particular religions"). Religious classifications have been subjected to strict

judicial scrutiny and invalidated under both religion clauses. *Church of the Lakumi Babylu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause); *Larson v. Valente*, 456 U.S. 228 (1982) (Establishment Clause); *see also McDaniel v. Paty*, 435 U.S. 618 (1978) (state constitutional provision prohibiting clergy from serving in legislature violates Establishment Clause).

As we have shown, administrative entanglement functions as a *de facto* denial of direct government aid to religious schools, solely because of the religious character of such schools. This denial of direct aid to religious schools may well be necessary to satisfy the compelling governmental interest of avoiding an Establishment Clause violation, if the government were not religiously neutral; that is, if it were to assist some religious schools but not others, or all religious schools, but not private secular and public schools. Such action might be justified for the same reason when aid is given directly to religious schools without controls to assure that it is used only for secular educational purposes. When, however, government financial or in-kind aid is made available to all on a religiously neutral basis under circumstances that ensure that it will not be used to teach or otherwise advance religion, there is no justification for denying to religious schools the equal protection of the laws.[6] As

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[6] *Cf.* Rectors of the Univ. of Va. v. Rosenberger, 115 S.Ct. 2510 (1995) (Establishment Clause does not justify denying evangelical student magazine reimbursement from university student activity fund on the same basis as other student publications); Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993) (same with respect to church access to public school facilities on same basis as secular groups); Widmar v. Vincent, 454 U.S. 263 (1981) (same with respect to student bible study and prayer group access to university facilities on the same basis as other student groups); *see also* Westside Comm. School Dist. v. Mergens, 496 U.S. 226 (1990) (upholding Equal Access Act's withholding of federal funds from public schools which deny approval of extra-curricular activities on the basis of their religious content).

Professor (now-Judge) Ripple cogently observed, "the policy considerations of entanglement must, at some point, meet the headwinds of equal protection. . . ." Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1205 (1980).

4. Political entanglement violates Establishment Clause neutrality by uniquely depriving religious individuals and groups of political and associational rights protected by the First Amendment.

Numerous scholars have criticized the political entanglement test because it devalues rights of political participation and association when these rights are exercised by religious individuals and groups. *See, e.g.*, Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 683-84 (1980); Edward McGlynn Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205, 230-31 (1980); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 346 (1986); Ripple, 27 U.C.L.A. L. REV. at 1226. In the very decision that spawned the entanglement prong, the Court observed that "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues," and insisted that "churches as much as secular bodies and private citizens have that right." *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970). Even so strong a proponent of entanglement analysis as Justice Brennan[7] strongly criticized use of political

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[7] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 408-14 (1985); Meek v. Pittenger, 421 U.S. 349, 373-84 (1975) (Brennan, J., concurring in part and dissenting in part); Lemon v. Kurtzman, 403 U.S. 602, 648-52 (1971) (opinion of Brennan, J.).

entanglement to deprive religious individuals and groups of fundamental constitutional rights. *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

B. To the extent that it invalidates church-state relationships which advance or inhibit religion, entanglement is redundant of the protection of religious voluntarism afforded by purpose and effect.

When invalidated government action violates the entanglement prong, it usually violates the purpose or effect prong as well. Peter Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 215 (1979). *Walz* itself described excessive entanglement as merely an effect that inhibits religion. 397 U.S. at 674; *accord* Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 349 (1986); Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1197 (1980); *see also Walz*, 397 U.S. at 692-94 (Brennan, J., concurring) (intrusion of state into affairs of churches resulting from taxation of church property would disfavor churches relative to analogous secular nonprofit associations in violation of effects prong). It is therefore unclear what entanglement adds to the analysis already supplied by purpose and effect. *See Aguilar v. Felton*, 473 U.S. 402, 430 (1985) (O'Connor, J., joined by Rehnquist, J., dissenting); *Roemer v. Maryland Bd. Pub. Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring).

For example, in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), the Court found that the delegation of municipal licensing authority to churches constituted political entanglement, *id.* at

127, but only after it had found that such delegation impermissibly advanced religion in violation of the effects prong. *Id.* at 125-26. Similarly, *Larson v. Valente*, 456 U.S. 228 (1982), suggested that a religiously discriminatory law constituted political entanglement after it had already determined that the law prescribed an impermissible denominational preference. 456 U.S. 246-55; *see also Board of Educ. v. Grumet*, 114 S.Ct. 2481 (1994) (legislative creation of school district whose boundaries precisely coincided with sectarian religious community held impermissible religious preference). Thus, because "the circumstances that give rise to excessive church-government entanglement also threaten violation of the Court's primary effect test," Peter Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 215 (1979), entanglement analysis is often redundant.

C. When it is not redundant, entanglement analysis depends on impressionistic judgments based on hypothetical facts.

The entanglement prong has contributed to the confusion in Establishment Clause jurisprudence in at least two ways. First, as we have explained, entanglement effectively denies most direct government aid to religious elementary and secondary schools on the ground that religion pervades every part of their activities and operations. By contrast, religious colleges and religious social service agencies are considered by the Court to be essentially secular entities. Aid to these entities is subjected to a more relaxed standard of review, with the result that most religious college and social service aid programs have been found not to violate the Establishment Clause. *See* Part I.C *supra*. Thus, "whether a religious group is classified as 'pervasively sectarian' is critical to the subsequent determination whether direct aid to

the group violates the Establishment Clause." FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 85 (1995).

Despite the critical importance of the pervasive/nonpervasive distinction, the nature of an aid recipient is often not documented by an evidentiary record or the subject of careful scrutiny by the Court. *See, e.g., Aguilar v. Felton*, 473 U.S. 402, 411-12 (1985); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Committee of Public Education v. Nyquist*, 413 U.S. 756, 767 (1973). The Court conclusively presumes that religious elementary and secondary schools are pervasively sectarian, *see e.g., Aguilar*, 473 U.S. at 411-12; *Grand Rapids School District v. Ball*, 473 U.S. 373, 384-85 (1985); *Nyquist*, 413 U.S. at 767-68, while there is a strong presumption that religious colleges and social service agencies, though religiously affiliated, are not pervasively sectarian. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988); *Aguilar*, 473 U.S. at 411; *Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 758-59 (1976). Social science data and other evidence suggests that both presumptions are inaccurate for large numbers of religious schools and colleges.[8] One commentator has characterized judicial understanding of religious elementary and secondary schools as an outdated description of Roman Catholic parochial schools in the 1950s. Peter Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 239-44 (1979). Others have questioned the accuracy of the

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[8] For a detailed review of the data and arguments, see FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 85-91, 169-74 nn.17-42 (1995).

Court's estimation of the sectarian influence at religious elementary and secondary schools.[9]

There is frequently no evidentiary basis for these presumptions. In *Aguilar* and *Grand Rapids*, for example, the Court feared religious indoctrination of religious school students by state instructional employees, despite the fact that the challenged programs in these cases had been in existence for many years without any evidence of such behavior. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 386, 388 (1985); *Aguilar v. Felton*, 473 U.S. 402, 428 (1985) (O'Connor, J., dissenting).

Second, when financial aid to religious schools is not accompanied by any means of assuring that it will not be used to advance religion, the Court has often estimated the likely effect of such aid and held the aid unconstitutional if it predicts this effect may advance religion. *See, e.g., Grand Rapids School District v. Ball*, 473 U.S. 373, 386, 397; *Meek v. Pittenger*, 421 U.S. 349, 370 (1975); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 779-80 (1973). In addition, it has often speculated that the sorts of government monitoring necessary to ensure that religion is not advanced would excessively intrude upon the religious aid recipient in violation of the entanglement prong. *See, e.g., Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Meek*, 421 U.S. at 370-72; *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). In either event, entanglement functions as a prophylactic against situations in which an impermissible purpose or effect

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[9] John Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61, 77 (arguing that even a very strong sectarian influence is unlikely to have any effect on employees who are paid, supervised, and evaluated by state agencies); William P. Marshall, *'We Know It When We See It': The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 525-26 (1986) (disputing that "providing counseling services in a particular building as opposed to across the street" affects the behavior of school counselors).

might occur. *E.g.*, *id.* at 624-25; *accord* Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1200-01, 1208 (1980).

When the Court employs entanglement as a prophylactic rule, it decides the constitutionality of a law "based upon a set of circumstances that does not exist." Gary J. Simson, *The Establishment Clause In the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 933 (1987). This is inappropriate in two respects. First, to speculate on the constitutionality of measures that might conceivably be adopted to ensure compliance with the purpose and effect prongs is merely to render an advisory opinion. *Id.* Second, this mode of analysis introduces an unacceptable degree of subjectivity into constitutional adjudication: "The degree of entanglement deemed 'excessive' often appears to be the product of personal judgments about certain religions and their institutions by a decision-maker who may or may not have any real exposure to the particular sect in question." Ripple, 27 U.C.L.A. L. REV. at 1218.

III. THIS CASE ILLUSTRATES THE DANGER AND REDUNDANCY OF APPLYING ENTANGLEMENT AS A DISTINCT TEST OF CONSTITUTIONALITY UNDER THE ESTABLISHMENT CLAUSE.

The immediate result of the Court's holding in *Aguilar v. Felton*, 473 U.S. 402 (1985), is that large numbers of educationally disadvantaged children were denied the benefits of a program of remedial assistance solely because they were attending religious schools. *Id.* at 419 (Burger, C.J. dissenting); *id.* at 431 (O'Connor, J. dissenting). The secular purpose of the assistance was undisputed, *id.* at 423 (O'Connor, J. dissenting), and the system of monitoring put in place by the state ensured that the assistance was not used to teach religion. The program failed

merely because the Court deemed this monitoring an excessive entanglement. *See, id.* at 409, 412-13.

That outcome cannot be squared with the neutrality principle. It is *not* religiously neutral to deprive children of secular educational benefits to which they are otherwise entitled, solely because they choose to attend private religious rather than secular public schools. For educationally disadvantaged children, the denial of these benefits constitutes a penalty on their decision to seek a religious education — a penalty that doubtless will influence at least some of them to return to public schools in order to recover those benefits. Entanglement thus has the indisputable effect of *undermining* religious voluntarism. The denial of benefits predicated on the religious character of the school the recipients attend constitutes a religious classification. In the clear presence of both a secular purpose and a primarily secular effect, that result cannot be justified as necessary to avoid a violation of the Establishment Clause. The instant case thus presents a stark illustration of the analytical bankruptcy of entanglement. In short, entanglement should be discarded as an element of Establishment Clause adjudication.

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,
Petitioners,

and

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

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BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 96-552 & 96-553

RACHEL AGOSTINI, *et al.*,
Petitioners,

and

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

---

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*

Pursuant to Rule 37.3 of this Court, the Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioners.[1] The Becket Fund is a bipartisan and ecumenical public interest law firm that protects the free

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[1] All parties have consented to the filing of this brief. Letters of consent from all parties have been filed simultaneously with this brief.

expression of all religious traditions. Our cases frequently involve allegations of improper entanglement under *Aguilar v. Felton*, 473 U.S. 402 (1985). For example, we are currently preparing a petition for writ of certiorari in a case that will be captioned *Schundler v. ACLU*. In that case, the Third Circuit held, among other things, that a city's policy of including a broad array of religious elements—from a Hanukkah Menorah to a Hindu parade—in its various cultural offerings, and accompanying all such cultural efforts with a sign celebrating diversity, was an unconstitutional entanglement under *Aguilar*. *Schundler v. ACLU*, No. 95-5965, slip op. (3d Cir. Jan. 13, 1997).

Our present brief will address the utility of entanglement analysis for the Court's Establishment Clause jurisprudence. Because of this focus we believe our brief will complement, and not duplicate, the briefs of the parties and thus prove helpful to the Court in its resolution of this case.

SUMMARY OF ARGUMENT

Justice O'Connor recently warned that while it "is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause . . . . But the same constitutional principle may operate very differently in different contexts." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 2498-99 (1994). The Court has often remarked similarly—beginning in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), itself, where the Court stressed that:

> Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.

Id. at 612.

This advice is particularly apt when it comes to entanglement analysis, which too easily leads itself to circularity—entanglement is "excessive" because it is improper, and improper because it is "excessive." The military chaplaincy involves the government in a far greater number and complexity of contacts with religious organizations than did the zoning regulation in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). Yet the military chaplaincy is not only constitutionally permissible, it is probably constitutionally required. By contrast, the zoning regulation in *Larkin* "enmesh[ed] churches in the exercise of substantial government powers" and was therefore held to be an establishment of religion. *Id.* at 126.

In short, which interactions between Church and State are benign, and which are "excessive entanglements," cannot be determined reliably just from the extent of mutual contact. That conclusion depends instead on the propriety of the contact—which is itself the ultimate question in Establishment Clause analysis.

Aguilar-style entanglement analysis is unworkable for another reason. It requires inquiry into the Free Exercise rights of third parties, which taxpayer plaintiffs have no standing to raise.

The inhibition of religion is by definition not the establishment of it. Inhibition is instead its opposite. But *Aguilar's* finding of an unconstitutional establishment of religion was based largely on the possibility that monitoring Title I teachers would inhibit religious belief and practice.

This is problematic. The specter of "state inspectors prowling the halls of parochial schools," *Felton v. Secretary,*

United States Department of Education, 739 F.2d 48, 67 (2d Cir. 1984), *aff'd*, *Aguilar v. Felton*, 473 U.S. 402 (1985), is certainly ominous. However, it is ominous not to taxpayers, but to those whose religious freedom is thereby threatened—the parochial schools and the parents who choose to send their children to them.

But individual parochial schools are free to refuse any or all government aid which they feel is intrusive, or potentially so. Moreover, both parochial schools and their students are capable of enforcing their own Free Exercise rights should they be infringed. Taxpayer plaintiffs do not have standing to try to do it for them.

ARGUMENT

I. ENTANGLEMENT ANALYSIS SHOULD NOT BE USED AS A FREE-STANDING "TEST" UNDER THE ESTABLISHMENT CLAUSE.

A. The Court Has Emphasized That All Of Its Establishment Clause Inquiries Are "Guidelines," Not "Tests."

Justice O'Connor recently warned that while it "is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause . . . . But the same constitutional principle may operate very differently in different contexts." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 2498-99 (1994). Accordingly, she emphasized that "the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Id.* at 2499.

The Court has often made a similar point. It has stressed that "[i]n each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch v. Donnelly*, 464 U.S. 668, 678 (1984). *See also Walz v. Tax Commissioner*, 397 U.S. 664, 669 (1970) ("rigidity could well defeat the basic purpose"of the Religion Clauses). Thus, the Court has refused to invalidate mechanically every governmental action which somehow involves religion. Instead,

> the Court has scrutinized challenged legislation or official conduct to determine *whether, in reality, it establishes a religion or religious faith, or tends to do so.*

Lynch v. Donnelly, 465 U.S. at 678 (emphasis added, citation omitted). *See also Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 591 (1989)(quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947)).

To be sure, the Court has developed useful criteria to aid in this determination. At the same time, however, the Court has always emphasized that the utility of these criteria must be kept in perspective. The criteria "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pettinger*, 421 U.S. 359 (1975)(emphasis added, citation omitted). This is true of the "principal evils" identified in *Walz*: "sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668. The Court has noted that their presence cannot be measured with any "constitutional caliper." *See Tilton v. Richardson*, 403 U.S. 672, 677 (1971).

It is likewise true of the three criteria collected in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). In *Lynch*, the Court

reminded us that it is unwilling "to be confined to any single test or criterion in this sensitive area. In two cases, the Court has not even applied the *Lemon* 'test.'" 465 U.S. at 679. Since *Lynch*, the Court's refusal to be shoe-horned into a unitary approach to the Establishment Clause has been even more pronounced. Indeed, in two recent Establishment Clause cases, the Court has not cited *Lemon*. *See Rosenberger v. Rectors and Visitors of University of Virginia*, 114 S. Ct. 2551 (1995); *Capital Square Rev. and Advisory Bd. v. Pinette*, 115 S. Ct. 2440 (1995). The Court apparently found *Lemon* unhelpful in deciding *Lee v. Weisman*, 505 U.S. 577 (1992). Even more strikingly, the Court in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), noted that the Court of Appeals used the *Lemon* analysis, but then did not itself mention *Lemon* anywhere else in its opinion.

And where the Court *has* chosen to use the *Lemon* criteria—even in *Lemon* itself—it has called for circumspection. This is especially true in its use of entanglement criterion:

> Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.

Lemon, 403 U.S. at 614. *See also Roemer v. Board of Public Works*, 426 U.S. 736, 766 (1976)("[t]here is no exact science in gauging the entanglement of church and state"); *Hunt v. McNair*, 413 U.S. 734, 746 (1973)("the degree of entanglement arising from inspection of facilities . . . varies in large measure with the extent to which religion permeates the institution"); *Tilton*, 403 U.S. at 685 (various factors can "substantially diminish the extent and the potential danger of the entanglement").

In sum, this Court has taught that the ultimate inquiry is "whether, in reality, [the challenged conduct] establishes a religion or religious faith or tends to do so." *Lynch*, 465 U.S. at 678. Comparing the conduct to the "principal evils" isolated in *Walz* and to the three criteria set forth in *Lemon* may well be helpful in discerning the answer. But,

> [t]here are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. *The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.*

Tilton, 403 U.S. at 678 (emphasis added). The present case provides the Court with an excellent opportunity to re-emphasize that principle and thus clarify the proper role of entanglement analysis in Establishment Clause cases.

B. Entanglement Analysis Is Especially Ill-Suited To Serve As A Separate Test Because It Assumes Its Own Conclusion.

It is not only desirable that entanglement analysis not be regarded as a free-standing "test," it is also logically preferable. To do otherwise is to risk making a circular argument—"entanglement" is "excessive" because it is improper, and improper because it is excessive. Under this Court's cases, it is not the *quantity* of contacts between Church and State that make for excessive entanglement; rather, it is the *quality* of such contacts that matter. The military chaplaincy involves the government in a far greater number and complexity of contacts with religious organizations than did the zoning

regulation in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). So do the various programs established by the Adolescent Family Life Act ("AFLA"). *See Bowen* v. *Kendrick*, 487 U.S. 589 (1988). Yet the *Kendrick* Court upheld AFLA. And the chaplaincy programs set up by the various branches of the military are not only constitutionally permissible, they are probably constitutionally required.[2] By contrast, the zoning regulation in *Larkin* "enmesh[ed] churches in the exercise of substantial government powers" and was therefore held to be an establishment of religion. *Id.* at 126.

A casual observer would not say, in the colloquial sense of the word, that the City of Cambridge and the church near Grendel's Den restaurant had become entangled with one another. The only contact involved was the church filing a written objection to the granting of a liquor license. *Id.* at 118. But this contact, however fleeting, "vest[ed] discretionary governmental powers in [a] religious bod[y]", *id.* at 123, and thus was held to be an excessive entanglement. The same casual observer would almost certainly say, again in the colloquial sense of the word, that the military chaplaincy and AFLA are both quite entangling. But they are not improperly so.

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[2] *See School District of Abington Township v. Schempp*, 374 U.S. 203, 297 (1963)(Brennan, J., concurring); *Id.* at 309 (Stewart, J., dissenting); *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985)(holding that chaplaincy is constitutionally required to effectuate free exercise rights of service members and to preserve neutrality under the establishment clause). *Cf. Kiryas Joel*, 114 S. Ct. at 2492 (quoting Justice Brennan's statement in *Abington* that "[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion." *Abington*, 374 U.S. at 299 (Brennan, J., concurring)).

In short, which relationships between Church and State are benign, and which are "excessive entanglements," cannot reliably be determined merely from the extent of mutual contact. It depends instead on the propriety of the mutual contact—which is itself the ultimate question in Establishment Clause analysis. Accordingly, a court cannot reliably determine that a certain "entanglement" is "excessive" until after it has already decided, on some other basis, that the relationship is improper.[3] It is the *substance* of the contact between church and state, and not some quantum of interactions, that is determinative.

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[3] *Aguilar* has found itself cited in support of some unusual results in the lower courts. The Third Circuit recently cited *Aguilar*'s in striking down a display of a menorah and a creche that were part of Jersey City's year-round celebration of ethnic, cultural, and religious heritage, including such diverse events as Republic of India Day, Ramadan Remembrance Day parade, an African American Art exhibit, a Dominican Republic flag raising, and a St. Patrick's Day parade. *Schundler v. ACLU*, No. 95-5965, slip op. (3d Cir. Jan 13, 1997). The menorah and creche were accompanied, as were all of the city's cultural efforts, by a sign tying the display to a broader celebration of diversity. The court of appeals, however, relying on *Lemon* and *Aguilar*, held that Jersey City had, through its "overall plan to celebrate different religions and cultures . . . pursued a quintessential type of government action that 'fosters an excessive entanglement with religion.'" *Schundler*, Slip Op. at 26 (quoting *Lemon*, 430 U.S. at 613). A petition for writ of certiorari is currently being prepared by undersigned counsel.

Aguilar has likewise been cited in striking down regulations governing the use of the term "kosher" in consumer marketing, *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1340 (4th Cir. 1995) (although "the ordinance violated the second prong of the *Lemon* test . . . the principle defect of the ordinance lies in its creation of excessive entanglement)." *Cf. Bonham v. District of Columbia Library Admin.*, 989 F.2d 1242 (D.C. Cir. 1993)("to close the library on Easter . . . the District would be forced to decide matters of 'deep religious significance,' *Aguilar v. Felton* . . . .").

This is not to say that the entanglement criterion is simply a makeweight. It is not. Rather, it provides a valuable perspective on the totality of the circumstances. As the Court noted in *Lemon*, "involvement or entanglement between government and religion serves as a warning signal [in advance of] where the 'verge' of the precipice lies." *Lemon*, 403 U.S. at 624-25. A high degree of interaction between church and state is a helpful clue in a court's investigation. But it cannot be pressed into service as a free-standing "test."

II. *AGUILAR'S* ENTANGLEMENT ANALYSIS IS PARTICULARLY PROBLEMATIC.

Aguilar's entanglement analysis is unworkable for another reason. It requires inquiry into the Free Exercise rights of third parties, which taxpayer plaintiffs have no standing to raise.

A. Inhibition of Religion Violates, If Anything, The Free Exercise Clause, Not The Establishment Clause.

The inhibition of religion is by definition not the establishment of it. Inhibition is instead its opposite. But *Aguilar's* finding of an unconstitutional establishment of religion turned largely on the possibility that required government monitoring of Title I teachers could lead to the inhibition of religious belief and practice, or as the Court put it, the "more than an imagined specter of governmental 'secularization of a creed.'" *Aguilar*, 473 U.S. at 414 (quoting *Lemon*, 403 U.S. at 650). The *Aguilar* Court thus found an Establishment Clause violation in large part because of the

threatened inhibition of religion.[4]

This is problematic. The specter of "state inspectors prowling the halls of parochial schools," *Felton v. Secretary, United States Department of Education*, 739 F.2d 48, 67 (2d Cir. 1984), *aff'd*, *Aguilar v. Felton*, 473 U.S. 402 (1985), is certainly ominous. However, it is ominous not to taxpayers, but to those whose religious freedom is thereby threatened—the parochial schools and the parents who choose to send their children to them. Had the monitoring hindered the religious beliefs or practices of the schools at any time from the inception of the program in 1966, they could have brought suit under the Free Exercise Clause. As it is, neither the schools nor the schoolchildren's parents believe their religious liberty to be in peril. In fact, both the schools and parent-intervenors have defended the program from the beginning.

B. Taxpayer Plaintiffs Lack Standing To Assert The Free Exercise Rights Of Third Parties.

Aguilar thus presents the unusual circumstance of taxpayer plaintiffs bringing a challenge to a government program, and prevailing, not because the challenged program established, aided, preferred, or endorsed religion, but because it was said to threaten the religious liberty of third parties— who could not have disagreed more.

That result is in considerable tension with this Court's

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[4]While the Court noted in dicta in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), that "[i]n our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general," the Court has never found an establishment based on disapproval—except in its entanglement analysis *a la Aguilar*.

established doctrine on standing. Interested would-be plaintiffs cannot acquire standing by virtue of some "shared individuated right to a government" that does not prohibit the free exercise of religion. *See Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 482 (1982). Article III requires a real or threatened injury. *Id.* at 472. *Flast v. Cohen*, 392 U.S. 83, 104 n.25 (1968), expressly declined to decide whether an assertion of the free exercise claims of third parties would be sufficient to confer taxpayer standing. And in *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court rejected an attempt by plaintiffs to raise the free exercise rights of third parties. In that case, the Court held that appellants lacked standing because they

> allege[d] only economic injury to themselves; *they [did] not allege any infringement of their own religious freedom* due to Sunday closing . . . .

McGowan, 366 U.S. at 429 (emphasis supplied).

So too here. Plaintiffs' anxiety for what are best characterized as the free exercise rights of nonpublic schools and their students is misplaced. Individual parochial schools are free to refuse any or all government aid which they feel is intrusive. Moreover, both parochial schools and their students are certainly capable of enforcing their own Free Exercise rights should they be infringed. Taxpayer plaintiffs have no standing to try and do it for them.

In short, entanglement analysis, in general, is ill-suited for service as an Establishment Clause test, and *Aguilar's* version of it particularly so.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be reversed, and *Aguilar v. Felton* overruled.

Respectfully submitted,

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On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF AMICUS CURIAE OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF PETITIONERS

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On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Knights of Columbus submits this brief amicus curiae in support of the petitioners. All parties to these cases have given their written consent to the participation of the Knights of Columbus, and copies of their written consent have been lodged with the Clerk pursuant to Rule 37.3(a) of the Supreme Court Rules.

The Knights of Columbus is a charitable Catholic family fraternal organization of close to 1.6 million members and their families, totaling nearly six million people. Founded in New Haven, Connecticut in 1882 by Father Michael J. McGivney, the Knights of Columbus has grown into an international organization with some 11,000 local councils located in all 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, Canada, Mexico, the Philippines and several other countries. The Knights of Columbus is the largest lay organization in the Roman Catholic Church.

Since its founding, the Knights of Columbus has been dedicated to several purposes: (i) rendering aid and assistance to its sick, needy and disabled members and their families; (ii) promoting social and intellectual discourse among its members and their families; (iii) promoting and conducting educational, charitable, religious, social welfare, war relief and public relief work; and (iv) maintaining a life insurance program for the benefit of its members, their beneficiaries and their families. Last year alone, the Knights contributed more than $105 million to charitable causes and provided roughly 50 million hours of volunteer service.

In addition, the Knights of Columbus has a long history of advocacy in this Court on issues of importance to the family and the Church, including issues involving religious liberty, church-state relations and parochial schools. For example, the Knights underwrote the litigation in *Pierce* v. *Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). The Knights of Columbus is a strong supporter of Catholic education; and many of its members send their children to parochial schools. The Knights of Columbus therefore has a strong interest in the Establishment Clause issues raised in these cases and in the overruling of *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

STATEMENT OF THE CASE

The Knights of Columbus adopts the statement of the case set forth in the brief of Petitioners Rachel Agostini, *et al.*, and wishes simply to underscore the following:

1. Title I remedial services are available to all children who are economically and educationally deprived, 20 U.S.C. §§ 6313, 6315(b), whether they attend public or parochial schools.

2. Title I funds in New York are used to teach remedial reading, math and English as a second language. No Title I funds are given directly to parochial schools.

3. Title I funds, which must be "secular, neutral, and nonideological," may only supplement, and not supplant, the services otherwise provided by the parochial school. 20 U.S.C. §§ 6322(b), 6321(a)(2).

4. Since this Court's decision in *Aguilar* v. *Felton*, *supra*, Title I services have been provided in alternative ways, including vans parked near parochial schools. These alternative methods already have cost New York more than $100 million.

SUMMARY OF ARGUMENT

The First Amendment prohibits the government from acting for certain purposes. The government may not purposefully suppress speech, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), or purposefully restrict the free exercise of religion, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 523 (1993), or purposefully advance "a religious cause." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2521-22 (1995).[1]

This Court consistently has held, however, that the unintended, incidental effects of governmental actions do

[1] The government may, of course, "act with the proper purpose of lifting a regulation that burdens the exercise of religion." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 328 (1987).

not violate the First Amendment. The government's actions may effectively burden speech. *Ward*, 491 U.S. at 791. Where unconnected to any other constitutional right, such as the right of parents to direct the education of their children, the government's actions may effectively restrict the exercise of religion. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990). The Establishment Clause similarly does not prohibit unintended, incidental benefits to religious institutions. *See, e.g., Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993). This Court has long held, for example, that parochial schools could benefit from "a general program under which [the state] pays the [bus] fares of pupils attending public and other schools." *Everson v. Board of Education*, 330 U.S. 1, 17 (1947). Because the class of beneficiaries was defined by the statute neutrally and without reference to religion, the fact that parochial schools benefited incidentally was not enough to violate the Establishment Clause. The government's purpose was to benefit all schoolchildren, and it could only satisfy that purpose by paying the bus fares of all schoolchildren, including parochial schoolchildren. The inevitable, foreseeable but unintended consequence of the government's purpose was to aid parochial schools, and the First Amendment was not violated.

In Establishment Clause cases, however, this basic First Amendment principle—that the unintended, incidental effects of governmental actions do not violate the Constitution—has had only inconstant application. This is ironic because the case for finding a constitutional violation among the incidental and unintended effects of a statute is even weaker under the Establishment Clause than under the Free Speech or Free Exercise Clauses. While the text of the First Amendment is consistent with a concern for incidental and unintended abridgment of speech or free exercise rights, an incidental and unintentional establishment of religion is an oxymoron. *Aguilar* nonetheless subjects the unintended, incidental effects of

governmental actions to a confusing and severe set of doctrines for which there is no parallel in free speech and free exercise cases. There is no sensible constitutional reason for treating unintended consequences under the Establishment Clause more severely than those under the Free Speech and Free Exercise Clauses. If the First Amendment does not prohibit truly incidental suppressions of speech or truly incidental restrictions of religious activity, it should not be read to prohibit truly incidental aid to religious activity.

The provision of Title I services on the premises of parochial schools is a case of unintended, incidental effects. The Title I program is constitutional, as this Court already has held. *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), *modified*, 422 U.S. 1004 (1975). Title I services are given to a broad, general class of beneficiaries—poor, remedial students—that is defined without reference to religion. Those services are purely secular and are given directly to the schoolchildren, not to the parochial schools. And, by statutory requirement, Title I can only supplement, not supplant, the curriculum provided by parochial schools. Any unintended, incidental benefit the parochial schools might gain from the provision of Title I services in their classrooms does not violate the Constitution.

ARGUMENT

In deciding First Amendment cases, whether under the Free Speech, Free Exercise or Establishment Clauses, this Court has focused on the government's purpose in acting; and, other than in *Aguilar*, it has not struck down a statute or program solely because of its unintended, incidental effects. There are many searching judicial devices for determining whether an effect is truly incidental; but that has been the crucial inquiry. A common principle of First Amendment cases is thus that the unintended, inci-

dental effects of governmental actions do not violate the Constitution. *Aguilar* fails to respect that common principle, and should be overruled.

I. UNINTENDED, INCIDENTAL EFFECTS OF GOVERNMENTAL ACTIONS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

From *Everson* to *Rosenberger*, the government's purpose in acting has been the central focus of Establishment Clause inquiry. The Establishment Clause requires courts to "inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation." *Rosenberger*, 115 S. Ct. at 2521.

To ensure that certain effects of governmental action are truly incidental, and not the result of "some ingenious device [adopted] with the purpose of aiding a religious cause," *id.*, at 2522, this Court has employed two principal devices. First, this Court has examined whether the class of beneficiaries is defined in a neutral way, without regard to religion. Second, this Court has examined whether the benefit flows to religious institutions because of the genuinely independent choices of private individuals. Neither technique of judicial inquiry is itself dispositive; both are meant to help determine whether an effect is truly incidental and thus whether the government has acted with a constitutional purpose.

A. Neutrality.

The text of a statute is the best expression of its purpose. When a statute defines a class of beneficiaries, the government's purpose is plainly to benefit that class as a class. This Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenu-

ated financial benefit." *Zobrest*, 509 U.S. at 8. See *Rosenberger*, 115 S. Ct. at 2521-22; *Witters* v. *Washington Dep't of Services for Blind*, 474 U.S. 481, 487-88 (1986); *Mueller* v. *Allen*, 463 U.S. 388, 397-400 (1983); *Widmar* v. *Vincent*, 454 U.S. 263, 274-75 (1981); *Walz* v. *Tax Com. of New York*, 397 U.S. 664, 673 (1970); *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); *Everson*, 330 U.S. 1, 17.[2]

"The purpose, or justification, of a regulation will often be evident on its face." *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2459 (1994). But not always. This is the problem of "sham" purposes.[3] When examining a statute, courts insist on more than a facial neutrality; substantive neutrality is required as well. *Board of Ed. of Kiyras Joel Village Sch. Dist.* v. *Grumet*, 114 S. Ct. 2481, 2490 (1994); *Hialeah*, 508 U.S. at 533-34. A truly neutral class of beneficiaries is the strongest evidence of the government's constitutional purpose.

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[2] This Court's emphasis on content-neutral regulations in free speech cases is analogous to the requirement of neutrality in Establishment Clause cases. If a statute limiting speech is written in terms of the content of speech, then the conclusion is almost inescapable that its purpose is to limit what can be said. See *Turner Broadcasting Sys.*, 114 S. Ct. at 2459; *Schacht* v. *United States*, 398 U.S. 58 (1970). A focus on whether a statute is by its terms "content-neutral" is an opening effort to scrutinize the words of the statute to make sense of the government's object or purpose in legislating. Similarly, in the free exercise context, there are "many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Hialeah*, 508 U.S. at 533-34.

[3] See *Wallace* v. *Jaffree*, 472 U.S. 38, 64 (1985) (Powell, J., concurring) ("a law will not pass constitutional muster if the . . . purpose articulated by the legislature is merely a 'sham' "); *Arcara* v. *Cloud Books Inc.*, 478 U.S. 697, 707 n.4 (1986) (O'Connor, J., concurring) (calling them "pretext[s]").

B. Independence.

If a religious institution benefits from governmental aid solely because of the "genuinely independent and private choices" of those actually receiving the aid, *Witters*, 474 U.S. at 487, the government is unlikely to harbor the hidden purpose of advancing religion. The fact that aid is given directly to students, parents or some other third party is thus another prominent indication that an indirect benefit flowing to parochial schools is truly an unintended, incidental effect, and not the government's hidden purpose. See, *e.g.*, *Rosenberger*, 115 S. Ct. at 2523 (payment made to third party); *Zobrest*, 509 U.S. at 9 (aid given directly to family); *Witters*, 474 U.S. at 487 (aid given directly to student); *Mueller*, 463 U.S. 401 (tax deduction given to parents).

Courts often test the government's purpose by examining what the statute actually permits or requires. "[T]he effect of a law in its real operation is strong evidence of its object." *Hialeah*, 508 U.S. at 535. Certain kinds of direct and substantial governmental aid to parochial schools, for example, have sometimes been considered evidence of a purpose to advance religion. In some cases, "direct grants of governmental aid" that relieve parochial schools of "costs they otherwise would have borne in educating their students" have been found unconstitutional. *Zobrest*, 509 U.S. at 12. Where, for example, the government "tak[es] over a substantial portion of [a parochial school's] responsibility for teaching secular subjects"—including courses in art, music and physical education—the government has provided what amounts to an unconstitutional "direct cash subsidy to the religious school." *Ibid.* (citing *Sch. Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985)). And the same might be true if the government were to directly give such schools "massive aid" in the form of teaching material and equipment. *Id.* (citing *Meek* v. *Pittenger*, 421 U.S. 349 (1975)).

C. The Provision of Title I Remedial Services In Parochial School Classrooms Is Constitutional.

The provision of Title I services to poor, remedial students on the premises of parochial schools satisfies the Establishment Clause because it is a neutral, independent grant of aid to schoolchildren. Under Title I, all schoolchildren who need help with math and reading are given instruction in those subjects from public employees, and by statute that instruction cannot replace what is provided in the student's parochial school. Any attenuated benefit to the parochial schools from the provision of Title I services in their classrooms is unintended, incidental and so perfectly constitutional. That should end the matter.[4]

II. ALONE AMONG FIRST AMENDMENT CASES, *AGUILAR* STRUCK DOWN A LEGISLATIVE PROGRAM BECAUSE OF ITS UNINTENDED, INCIDENTAL EFFECTS.

Aguilar stands alone, in defiance of the basic First Amendment principle that unintended, incidental effects do not violate the Constitution. Instead of employing that basic principle, which the Establishment Clause shares with the Free Speech and Free Exercise Clauses, *Aguilar* went its own way; it adopted what might be called a constitutional consequentialism, in which the incidental effects of governmental actions are seen as themselves posing independent constitutional problems.

Effects resonate. They are never neutral. Consequentialists are thus forever facing how they might, in a principled way, separate constitutional effects from unconstitutional ones. Clearly, not all governmental actions that effectively aid religion are unconstitutional. *Zobrest*,

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[4] There can be no endorsement of religion where a governmental action provides only an incidental benefit to religion. No one endorses what is truly unintended and incidental. See *Capitol Square Review & Advisory Bd.* v. *Pinette*, 115 S. Ct. 2440, 2447-48 (1995) (plurality).

509 U.S. at 8. State provision of police and fire protection effectively aids religion, yet no one argues that they are unconstitutional. *Everson*, 330 U.S. 1. Tax exempt status for churches effectively aids religion. *Walz*, 397 U.S. 664. Tax deductions for parochial school tuitions, transportation and textbooks effectively aid religion. *Mueller*, 463 U.S. 388. State-paid interpreters and state-paid printing of religious material effectively aid religion, too. *Zobrest*, 509 U.S. 1; *Rosenberger*, 115 S. Ct. 2510. And yet these and other unintended, incidental effects of governmental actions are plainly constitutional. *Aguilar*'s consequentialism cannot adequately explain those cases; and its logic is flatly inconsistent with them.

A. Unintended, Incidental Effects in Free Speech and Free Exercise Cases.

This Court's free speech and free exercise precedents hold that the unintended, incidental effects of governmental actions do not violate the Constitution. The same should be true in Establishment Clause cases.

1. *Free Speech.*

In free speech cases, the "government's purpose is the controlling consideration." *Ward*, 491 U.S. at 791. In *Ward*, New York City passed regulations designed to protect residents near the band shell in Central Park from excessive noise; those regulations obviously and inevitably had a speech-limiting effect on those performing in the band shell. This Court held the regulations constitutional, as incidental restrictions of speech. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* (citations omitted). See *Turner Broadcasting Sys.*, 114 S. Ct. at 2469; *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968).

Ward also held that the government's incidental effect on speech need not be the least restrictive possible. While it must be "narrowly tailored to serve the government's legitimate content-neutral interests," a time, place or manner regulation "need not be the least-restrictive or least-intrusive means of doing so." *Ward*, 491 U.S. at 798-99. The less restrictive means test is meant to make sense of the government's purpose in acting—by asking if that purpose would be more (or less) complete if the speech-limiting effects did not attend it; and that sort of test does not require the least possible effect of governmental action on speech.

2. *Free Exercise.*

In free exercise cases, "the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Hialeah*, 508 U.S. at 523. As with other First Amendment provisions, the central concern of the Free Exercise Clause is the government's purpose in acting. The point was made dramatically in *Employment Div.* v. *Smith*, 494 U.S. 872. Oregon criminalized the use of various drugs, including peyote. Smith, a member of the Native American Church, smoked peyote at one of the Church's religious ceremonies. This Court upheld Oregon's criminal law as imposing only an "incidental effect" on Smith's religious activity, even though it burdened the exercise of his religion: "if prohibiting the exercise of religion . . . is not the object of [a general law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment is not offended." 494 U.S. at 878.

Whether or not one agrees with the holding of *Smith*, and many do not,[5] its logic is clear: where no other con-

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[5] The common object of the Religion Clauses is religious liberty, and there is thus good reason to scrutinize incidental burdens on religious exercise more severely than incidental aid to religious institutions. Taken together, however, *Smith* and *Aguilar* do just

stitutional right is implicated, the First Amendment is not violated so long as the object or purpose of a generally applicable law is constitutional—even if the unintended effect of that law is incidentally to burden one's religious activity. The Court's focus on the government's purpose is evident from its care in noting that there had been no suggestion by either party that the government was seeking to satisfy any hidden unconstitutional purpose through the application of the law. 494 U.S. at 882. The *Smith* court also noted that the government would violate the Free Exercise Clause "if it sought to ban acts or abstentions only when they are engaged in for religious reasons or only because of the religious beliefs they display." *Id.* at 877. In such cases, one could only conclude that the government's purpose was to restrict religious activity.

Similarly, in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439 (1988), the Court held that the government's construction of a road through a national forest that traditionally had been used by American Indian tribes for religious activity did not violate the Free Exercise Clause. This Court acknowledged that the road's construction "could have devastating effects on traditional Indian religious practices," but considered these to be "incidental effects." *Id.* at 451. The Court stressed, however, that "the Government has taken numerous steps . . . to minimize the impact that construction of the G-O road

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the opposite—and religious liberty loses twice. For its part, *Smith* examined only the formal neutrality of Oregon's statute, which was neutral only in the sense that laws forbidding people to sleep under bridges are formally neutral. Oregon refused to grant an exemption for the sacramental use of peyote (or, in another era perhaps, sacramental wine) for no articulable reason; its religion-neutral interests would have been served as equally with such an exemption as without. A governmental action that "visits gratuitous restrictions on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Hialeah*, 508 U.S. at 538 (citation omitted).

will have on the Indians' religious activity." *Id.* at 454. The government sought to satisfy its purpose with a minimal effect on Indian religious practices. That was good evidence that the government's purpose was constitutional and that its effects were truly unintended and incidental.

B. *Aguilar* and the False Problem of Unintended, Incidental Effects in Establishment Clause Cases.

The fundamental mistake of *Aguilar* is that it sees a constitutional problem where none exists. The unintended, incidental effects of governmental actions—like those produced by the provision of Title I services in parochial school classrooms—do not violate the Establishment Clause, even if they effectively advance religion. Acknowledging Title I's "well-intentioned efforts," *Aguilar* nonetheless built a structure of doctrines because it feared the mere possibility of an unintended consequence: "the infiltration of religious thought" in Title I instruction. 473 U.S. at 413. But the Constitution simply does not prohibit the government from effectively aiding religion, any more than it prohibits the government from effectively limiting speech.

The various and novel aspects of *Aguilar*—political divisiveness, administrative entanglement, the "excessive entanglement" produced by the "ongoing inspection" of Title I's public employees—are alternative devices for preventing the government from effectively aiding religion. *Ibid.* at 412-14. Those devices (or something like them) will last as long as the Court considers its task under the Establishment Clause to be weighing up the good and bad states of affairs that effectively aiding religion might be said to contain.

Aguilar's doctrine of "excessive entanglement" represents the highwater mark of a misguided focus on incidental and unintended effects. It has been the consequentialist trump card. Of course, "excessive entangle-

ment" has trumping power only because, as Chief Justice Rehnquist has pointed out repeatedly, it is a "Catch 22" argument: the Constitution will not allow various forms of unintended, incidental aid to parochial schools without "ongoing supervision" of their use; and the intense scrutiny of this required supervision itself violates the Constitution. *Wallace* v. *Jaffree*, 472 U.S. 38, 109-110 (1984) (Rehnquist, J., dissenting). Under *Aguilar*, the Constitution requires what the Constitution forbids. This is the *reductio ad absurdum* of a misguided focus on unintended effects. To avoid the constitutional problems created by conveying unintended benefits one must engage in extensive monitoring (after all, unintended and incidental benefits are much more difficult to detect than overt and substantial ones), only to be told that even if the monitoring succeeds, the program will be declared unconstitutional on the entanglement prong.

The real problem of *Aguilar*, however, is not its bizarre doctrinal innovations, but its mistaken sense that such devices are needed. They are not. The unintended, incidental effects of governmental action do not violate the Constitution.

III. *Aguilar's* On-Premises/Off-Premises Distinction Has No Constitutional Significance and Should Be Overruled.

The Constitution is not a parking code. And yet, under *Aguilar*, federal courts unanimously have held that the government may provide Title I services to parochial school students in vans parked just over the fringe of parochial school property, but not on the school's property or in its own classrooms. See *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Board of Educ.* v. *Alexander*, 983 F.2d 745 (7th Cir. 1992); *Barnes* v. *Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido* v. *Cavazos*, 934 F.2d 912 (8th Cir. 1991). At the barest minimum, this Court should end that sort of

line-drawing. Requiring the provision of Title I services off the premises of parochial schools is costly, disruptive and pointless. Indeed, "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Zobrest*, 509 U.S. at 13. This Court already has approved the provision of health services, diagnostic speech and hearing services and sign-language interpreters on the premises of parochial schools. *Id.* at n.10 (citations omitted). If public employees may constitutionally translate the homily during Mass at Salpointe Catholic High School for a parochial school student, *id.* at 19 (Blackmun, J., dissenting), they surely can teach remedial math and reading to Title I students in their own classrooms.

CONCLUSION

Aguilar should be overruled. And in doing so, this Court should make clear that, as with other provisions of the First Amendment, the unintended, incidental effect of advancing religion does not violate the Establishment Clause. The judgment of the Court of Appeals should be reversed and the case remanded with instructions to vacate the injunction.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF UNITED STATES SENATOR ROBERT F. BENNETT IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF UNITED STATES SENATOR ROBERT F. BENNETT IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, Senator Robert F. Bennett submits this brief *amicus curiae* in support of Petitioners. Consent to the filing of this brief has been granted by all parties. Copies of the letters of consent have been lodged with the Clerk.

This case raises momentous questions regarding the status and future direction of Establishment Clause jurisprudence. As a Member of the United States Senate, Senator Bennett has a keen interest in the evolution of legal doctrine that affects the rights of religious individuals and religious institutions in American society. We believe this perspective will complement the briefs of the parties and assist the Court in the proper resolution of this case.

SUMMARY OF ARGUMENT

Although *Lemon v. Kurtzman* today stands as a controversial symbol of government hostility to religion, its three conceptual prongs were not intended to prohibit government aid to religion or to enforce the separation of church and state. Rather, this analytical framework was designed to protect "religious voluntarism"— the idea that individual religious choice should be insulated from the influence of noncoercive government action that encourages or discourages religious belief or activity. "Secular purpose" and "primarily secular effect," for example, were well established doctrinal elements of Establishment Clause jurisprudence prior to *Lemon*, and were consistently applied to protect religious voluntarism. In the single pre-*Lemon* decision in which it was used, the relatively new concept of "entanglement" was likewise employed to protect religion from government, *not* government from religion. Even the Court's post-*Lemon* decisions permit substantial financial and in-kind aid to religion so long as such aid does not bias the choice between religion and nonreligion.

Entanglement analysis went wrong almost from its initial use in *Lemon*, threatening religious voluntarism without offering any compensating protection. Instead of being deployed to protect individual religious choice, entanglement has become an independent constitutional value that has calcified the division between church and state, even when the separation undermines

voluntarism. The consequences of this doctrine gone awry are gravely disturbing. Entanglement is routinely used to deny religious individuals and organizations equal access to social benefits in violation of the religious neutrality otherwise mandated by the Court's Establishment Clause jurisprudence. Entanglement exacerbates the tension between the Free Exercise and Establishment Clauses by casting doubt on the legitimacy of exemptions obtained by individuals and organizations through the political process. Moreover, entanglement ironically leads to discrimination on the basis of religion in violation of the Equal Protection Clause of the Fourteenth Amendment. Finally, entanglement deprives religious individuals and organizations of fundamental political and associational rights protected by the First Amendment.

The tragedy in all of this is that entanglement analysis has such negative consequences while contributing so little to Establishment Clause jurisprudence. In many cases, entanglement merely mimics the protection of religious voluntarism offered by the purpose and effect prongs of *Lemon*. It avoids analytic redundancy only by relying on caricatures of religious schools that are frequently unsupported by the factual record, and engaging in standardless judgments based on hypothetical facts. The case at bar vividly illustrates the dangers of applying entanglement as a test of Establishment Clause constitutionality independent of religious voluntarism. In light of its deficiencies, the entanglement prong should be dropped as a test of constitutionality under the Establishment Clause.

ARGUMENT

I. THE THREE-PRONGED TEST OF *LEMON V. KURTZMAN* WAS DESIGNED TO PROTECT RELIGIOUS VOLUNTARISM, NOT TO PROHIBIT ALL GOVERNMENT AID TO RELIGION OR TO ENFORCE THE SEPARATION OF CHURCH AND STATE AS AN INDEPENDENT VALUE.

Religious voluntarism is the principle that the popularity and vitality of any religious activity should depend on the intrinsic attractions of the activity to its adherents, and not on the extrinsic effects of government encouragement or opposition. Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968). A doctrinal regime committed to religious voluntarism seeks to "minimize the effect [government] has on the voluntary, independent religious decisions of the people as individuals and in voluntary groups." Thomas Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 695, 706 (forthcoming March 1997); *accord*, Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990).

This Court has long recognized that religious voluntarism is the fundamental purpose of the religion clauses.[1] A commitment to

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[1] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (The purpose of the religion clauses "is to insure that no religion be sponsored or favored, none commanded, and none inhibited."); Zorach v. Clauson, 343 U.S. 306 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one [religious] group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."); Engel v. Vitale, 370 U.S. 421, 429 (1962) ("[E]ach separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for

religious voluntarism is also the undoubted source of the Court's insistence that government remain neutral with respect to the religious choices of its citizens,[2] because "neutrality reduces (and in theory eliminates) the impact that governmental action has upon individual choice with respect to religion." Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 11 (1989); *see also Walz*, 397 U.S. at 696 (Harlan, J., concurring) (Government action that "neither encourages nor discourages religion . . . satisfies the voluntarism requirement of the First Amendment.").

Religious voluntarism is violated by government persuasion as much as by government coercion. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1002 (1990). Thus, whereas the Free Exercise Clause protects individual religious choices from purposeful religious coercion by government, *see, e.g., Church of the Lakumi Babylu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Establishment Clause protects these choices from government actions that have the purpose or primary effect of encouraging or discouraging religion, even when the government has not used its coercive power directly to mandate or to prohibit religious belief or practice. *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962).

A. Prior to their incorporation into the *Lemon* test, "secular purpose" and "primarily secular effect" were well-established doctrinal tests meant to protect religious voluntarism.

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religious guidance.").

[2] *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373, 382 (1985); Everson v. Board of Educ., 330 U.S. 1, 14-15, 15-16 (1947).

Although *Lemon v. Kurtzman* was the first decision of the Court to combine secular purpose, primarily secular effect, and entanglement into a single test, *see* 403 U.S. 602, 612-13 (1971), only entanglement was a new analytical concept, having been articulated just the preceding Term. *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). By contrast, a full eight years before *Lemon*, the Court had synthesized its entire body of Establishment Clause precedent since *Everson* into the requirement that government action have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (*citing McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Everson v. Board of Educ.*, 330 U.S. 1 (1947). *Board of Education v. Allen* approved *Schempp*'s test of constitutionality under the Establishment Clause, 392 U.S. 236, 242-43 (1968), and *Lemon* cited *Allen* as authority for adopting purpose and effect as two of its three doctrinal prongs. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

1. Prior to *Lemon*, secular purpose and primarily secular effect were consistently applied to insulate individual religious choice from the influence of noncoercive government action.

The three pre-*Lemon* decisions that found violations of the Establishment Clause all involved public school programs which encouraged but did not require student participation in religious teaching or practice. In *McCollum v. Board of Education*, the Court invalidated a program which authorized priests, ministers, and rabbis to use public school classrooms for religious instruction of interested students, finding that even voluntary on-campus religious instruction impermissibly relied on compulsory education laws to assist religious groups in the propagation of their faith. 333 U.S. 203, 209-10 (1948). In *Engel v. Vitale*, the Court found that classroom recitation of a state-authored prayer

at the beginning of each school day was "wholly inconsistent" with the Establishment Clause, even though students could choose not to participate. 370 U.S. at 421, 423 & n.2, 430. "The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American public can say. . . ." *Id.* at 429. In *Abington School District v. Schempp*, the Court invalidated formal classroom recitations from the Bible, again deeming it irrelevant that students were excused from participating in the exercises. 374 U.S. 203, 223-25 (1963). The Court found that even in the absence of direct coercion, Bible reading could not plausibly be characterized as having a primarily secular effect that neither aided nor opposed religion. *Id.* at 223.

Decisions of the Court upholding programs of assistance to religion prior to *Lemon* were also principally concerned with preserving religious voluntarism. *See, e.g., Board of Education v. Allen*, 392 U.S. 236, 243-44 (1968) (textbook loan program benefitting religious school students did not violate the Establishment Clause because books were provided free of charge to all students upon their request, regardless of the public, private, or religious character of their schools); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (state authorization of voluntary off-campus released-time religious instruction was merely permissible state cooperation "in a religious program to the extent of making it possible for . . . students to participate in it.").

2. The single pre-*Lemon* decision that employed the concept of entanglement likewise focused on the protection of individual religious choice from noncoercive government action.

Walz v. Tax Commission held that property tax exemptions for churches were consistent with the Establishment Clause because exemptions minimized church-state "entanglement"— that is, the government interference in religious practice that would inevitably result from "tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of these legal processes." 397 U.S. 664, 674 (1970). The chief rationale was the curtailment of religious liberty that historically has accompanied taxation of churches. *Id.* at 673. In *Walz*, entanglement was envisaged as preventing government's use of the "regulatory strings attached to powerful financial benefits" to exercise control over a religious group's "beliefs, policies, or actions." Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV 311, 346 (1986).

C. The Court's post-*Lemon* decisions permit substantial financial and in-kind aid to religion so long as such aid does not bias the choice between secular public schools and private religious schools.

1. Indirect aid to religious schools and other "pervasively sectarian" institutions is permissible if directed to students and their parents pursuant to broad, secularly defined benefit categories.

The Court has long presumed that religious elementary and secondary schools exist primarily to inculcate their students with the beliefs of the sponsoring faith, and thus that the sponsor's religious beliefs and practices pervade every aspect of the schools' activities. *See, e.g., Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 379 (1985); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 613, 615-16, 620 (1971). Accordingly, the Court has generally held that financial

or in-kind aid given directly to religious schools and other such "pervasively sectarian" institutions advances religion in violation of *Lemon*'s primary secular effect prong. *See, e.g., Grand Rapids*, 473 U.S. at 385; *Meek*, 421 U.S. at 366; *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 779-80 (1973). By contrast, when aid is given directly to religious school students or their parents pursuant to broad, secularly defined classes, the Court has generally found no Establishment Clause violation. *See, e.g., Zobrest v. Catalina Hills School Dist.*, 509 U.S. 1 (1993); *Mueller v. Allen*, 463 U.S. 388 (1983); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *cf. Witters v. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (declining to invalidate state vocational rehabilitation assistance used by a visually handicapped student to study for the ministry at a Bible college).

Even though aid to students and parents obviously assists any religious school which the students might attend, the Court's opinions make clear that such aid does not result in a primary effect of advancing religion, because the aid is received by religious schools only as the result of the individual religious choices of students and parents. *See, e.g., Zobrest*, 509 U.S. at 10, 13-14; *Mueller v. Allen*, 463 U.S. 388, 399-400 (1983); *cf. Witters*, 474 U.S. at 487, 488 (when recipient of state vocational rehabilitation assistance chooses to study for ministry at Bible college, the college benefits only as the result of the recipient's religious choice).

In sum, although financial and in-kind assistance to students attending private religious schools benefit these schools, such assistance does not violate the Establishment Clause because the schools receive the benefits only as individual recipients choose to attend them. In these circumstances, financial or in-kind aid funds the private choices of individuals (including religious individuals), and only incidentally the educational institutions

(including religious schools) that are the beneficiaries of these choices. *See* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 585 (1968). As demanded by religious voluntarism, this ensures that religious schools and other pervasively sectarian institutions in the United States exist as the consequence of the private choices of religious individuals rather than the collective choices of government.

2. Direct aid to religious schools and other pervasively sectarian institutions is permissible so long as there is no possibility that such aid could be diverted to encourage religious belief or practices.

Although the Court regularly emphasizes the importance of the individual-institutional distinction to the constitutionality of religious school aid programs, *e.g.*, *Mueller v. Allen*, 463 U.S. 388, 399 (1983); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 780-81 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971); *Board of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968), it nevertheless has upheld both cash and in-kind assistance given directly to religious schools when there is no possibility that the aid could be used to promote religious belief or practice. *Wolman v. Walter*, 433 U.S. 229 (1977), considered, among other programs, a state's practice of administering and grading required achievement tests free of charge for religious school students. The Court held that since the religious schools controlled neither the content of these tests nor their results, the tests could not be used to teach religion in violation of the primary effect prong; and that, correspondingly, there was no need for close government monitoring of religious school teaching that would violate the entanglement prong. *Id.* at 240-41.

In *Committee for Public Education v. Regan*, 444 U.S. 646 (1980), the Court even upheld cash reimbursements to religious schools for expenses incurred in using their own employees to administer and grade state-mandated tests. The Court again concluded that these tests could not be used to teach religion because state employees prepared them and the objective nature of the test questions ensured that religious considerations would not influence grading. *Regan*, 444 U.S. at 654-56 (*quoting Wolman v. Walter*, 433 U.S. 229, 240 (1977)). The Court further held that record-keeping and reporting requirements mandated by the program would ensure that reimbursements were made only for secular services, and that these requirements did not constitute an excessive entanglement of the state with religious schools. 444 U.S. at 659-61.

3. Direct aid to religious colleges and other "nonpervasive" religious institutions is permissible when it is part of a secular social welfare program.

In religiously sponsored colleges the secular goal of teaching critical thinking by secular academic methods is thought to eclipse the religious goal of inculcating sectarian beliefs and practices. *See Roemer*, 426 U.S. at 750, 751 (plurality opinion); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971) (plurality opinion). Additionally, the relative age and maturity of college students compared to students in elementary and secondary schools makes it unlikely that college students will be manipulated into adopting particular religious beliefs or practices encouraged by a religious college. *See Roemer v. Maryland Bd. Pub. Works*, 426 U.S. 736, 750 (1976) (plurality opinion); *Tilton*, 403 U.S. at 685-86 (plurality opinion). For both of these reasons, the Court has concluded that, in contrast to religious elementary and secondary schools, religious colleges are generally not "pervasively sectarian." *Roemer*, 426 U.S. at 758-59 (plurality opinion); *Tilton*, 403 U.S. at 681, 687 (plurality

opinion). *See also Bowen v. Kendrick*, 487 U.S. 589, 610-11 (1988) (Adolescent Family Life Act did not facially violate Establishment Clause by permitting grants to religiously sponsored social service agencies along with secular agencies, when only a small percentage of eligible grant recipients were likely to be "pervasively sectarian."

In upholding the constitutionality of financial aid to religious colleges, the Court emphasized the pervasiveness of government aid in contemporary society. *See, e.g., Roemer*, 426 U.S. at 745 (plurality opinion). If most colleges are receiving government aid, neutrality does not require that otherwise eligible religious colleges be denied aid solely because of their religious affiliation.[3]

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[3] *Roemer*, 426 U.S. at 747 (plurality opinion); *cf. Bowen*, 487 U.S. at 595-96, 608-09 (federal law authorizing cash grants to religious as well as secular social service agencies for pregnancy counseling does not violate establishment clause because "nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution"); *Walz* v. Tax Comm'n, 397 U.S. 664, 671 (1970) (property tax exemption for churches "along with nonprofit hospitals, art galleries, and libraries" was equivalent to supplying churches the same police and fire protection provided to everyone else). *See also* Board of Educ. v. Grumet, 114 S.Ct. 2481, 2491 (1994) ("[W]e have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges."); Zobrest v. Catalina Hills School Dist., 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."); Board of Educ. v. Allen, 392 U.S. 236, 242 (1968) ("[T]he Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation. . . ."); Everson v. Board of Educ., 330 U.S. 1, 16 (1947) ("[The state] cannot exclude individual Catholics, Lutherans, Mohammedans, or members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.")

II. "ENTANGLEMENT" ANALYSIS THREATENS RELIGIOUS VOLUNTARISM AND OTHER FUNDAMENTAL CONSTITUTIONAL VALUES WITHOUT OFFERING ANY COMPENSATING PROTECTION.

The Court has distinguished two kinds of church-state entanglement which run afoul of the Establishment Clause. "Administrative" or "institutional" entanglement describes church-state relationships in which the government monitoring thought necessary to ensure that government aid not be used to advance religion, is itself so intrusive as to constitute an independent violation of the Establishment Clause. Edward McGlynn Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205, 211 (1980). Government monitoring of teachers in religious elementary and secondary schools to ensure that they are not advancing religion is the paradigm case of excessive administrative entanglement. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *Meek v. Pittenger*, 421 U.S. 349, 369-70 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 617-19, 620-22 (1971). In fact, the Court has never found excessive administrative entanglement to exist outside the context of financial aid to religious schools.

"Political" entanglement describes church-state relationships likely to cause "[p]olitical fragmentation and divisiveness on religious lines." *Lemon*, 403 U.S. at 623. Cash subsidies to parochial schools are thought to create political entanglement because of the risk of yearly budget battles in which political opponents are distinguished principally by denominational affiliation or lack thereof. *Id.* at 622. The Court has confined political entanglement to cases involving direct cash subsidies to religious schools or their teachers, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 n.17 (1987); *Mueller v.*

Allen, 463 U.S. 388, 403 n.11 (1983), and has further suggested that it is not an independent test of constitutionality under the Establishment Clause. *See Lynch*, 465 U.S. at 684-85; *id.* at 689 (O'Connor, J., concurring).

A. The development of entanglement as an independent test of constitutionality has threatened religious voluntarism and legitimized violation of the fundamental constitutional rights of religious individuals and groups.

Numerous commentators have observed that the "separation of church and state" is not an independent constitutional value, but merely a means by which religious liberty is protected. *See, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 107 (1993); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 67 (1995). Voluntarism is thus a more fundamental constitutional value than separation. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, §14-11, at 1160 (2d ed. 1988); *cf.* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 67 (1995) ("[R]eligious liberty is considered *more fundamental* than nonestablishment.") Indeed, the Court has affirmed that religious voluntarism is the fundamental purpose of the Establishment Clause,[4] while rejecting the notion that total separation of church and state is either possible or desirable.[5]

Consistent with this view of voluntarism as the fundamental Establishment Clause value, *Walz* envisaged entanglement

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[4] *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); Zorach v. Clauson, 343 U.S. 306, 312 (1952); Engel v. Vitale, 370 U.S. 421, 429 (1962).

[5] *E.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 760 (1973); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), *quoted with approval in* Lynch v. Donnelly, 465 U.S. 668 (1984); *Walz*, 397 U.S. at 670; *Zorach*, 343 U.S. at 312, *quoted with approval in Walz*, 397 U.S. at 669.

analytic tool for identifying situations in which the choices of religious individuals and organizations might be exposed to the distorting influence of government encouragement or discouragement of religion. *See* Part I.A.2 *supra*. *Lemon*, however, cut entanglement loose from its mooring to voluntarism. Freed from that constraint, entanglement developed as a doctrine that enforces church/state separation not simply independent of religious voluntarism, *but at its expense*. In the name of "separation of church and state," entanglement has devalued religious voluntarism and legitimized government deprivation of religious liberty and other fundamental constitutional rights of religious individuals and groups.

1. In a modern welfare state, use of administrative entanglement to deny government aid to religious schools violates the religious neutrality mandated by the Establishment Clause.

Two hundred years ago, when government taxation and subsidies were uncommon and insignificant, merely separating church and state was a viable strategy for achieving religious neutrality. Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 639 (1995). A constitutional doctrine that preserved religious neutrality by prohibiting aid to both religion and nonreligion was eminently feasible "in a country with no public education, no public transportation, no public health and safety programs — in short, a libertarian, caretaker state." John Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 99 (1986). Neutrality meant simply leaving religion alone, neither taxing it nor subsidizing it. Esbeck, 70 NOTRE DAME L. REV. at 639; Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 522 (1968).

In an age, however, when our government taxes and funds virtually every aspect of American life, "simply leaving religion alone" imposes disproportionate financial burdens on religious beliefs and practices, violating religious neutrality and undermining religious voluntarism. Esbeck, 70 NOTRE DAME L. REV. at 639; Giannella, 81 HARV. L. REV. at 525-26; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990); Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 11 (1989). "Older views stressed governmental abstention as a condition (if not the substance) of freedom, [b]ut increasingly, affirmative governmental intervention is invoked to provide resources and opportunities for desired freedoms." Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 216, 268.

In the modern welfare state that the United States has become, many persons and entities receive some kind of government aid. Religious neutrality requires that this aid not be denied to otherwise qualified recipients simply because they are religious. "[R]eligious organizations should be able to compete on the same grounds as other groups . . . they should not, on Establishment grounds, be relegated to second-class status." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 121 (1993). To deny aid to otherwise qualified religious recipients constitutes a tax on religious exercise which undermines voluntarism by skewing private choice away from religion. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 355 (1986).

This is particularly the case with respect to elementary and secondary education in the United States. Public schools are supported by local tax dollars supplemented, in most cases

substantially, by state and federal grants. Parents of religious school students are not permitted to opt out of paying these taxes, and in very few states are they entitled to any tax relief, despite the fact that they save local, state, and federal governments thousands of dollars by educating their children privately. Jesse Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 285 (1968); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 844 (1984); McConnell & Posner, 56 U. CHI. L. REV. at 24; Paulsen, 61 NOTRE DAME L. REV. at 359. Government aid to private religious schools is merely a modest attempt to readjust the tax burden of education costs between those parents who desire a public secular education for their children, and those who desire a religious education but are compelled through taxation to pay for the public education their children do not use. Johnson, 72 CALIF. L. REV. at 822; Paulsen, 61 NOTRE DAME L. REV. at 356, 358 & n.210. Genuine neutrality between religious schools and public schools — between "religion and nonreligion" — requires that religious schools be apportioned a share of educational tax dollars reflecting the secular value of the education they supply. If most schools receive government aid, then religiously neutral funding requires that religious schools be eligible to receive it as well. Giannella, 81 HARV. L. REV. at 572, 575; Johnson, 72 CALIF. L. REV. at 845.

Administrative entanglement, however, functions to prevent religious schools from receiving most forms of direct aid from the government, by making it impossible for direct aid to satisfy the *Lemon* test. If government aid comes without any monitoring procedures to ensure that the aid will not be used to advance the religious mission of the religious school recipients, it will almost certainly be held to violate the primary secular effect prong of *Lemon*. *See, e.g., Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 386 (1985); *Leavitt v. Committee for Pub. Educ.*, 413 U.S.

472, 479-80 (1973). If, on the other hand, a means is provided to guarantee that government aid will not be used to advance the religious mission of the recipients, it will almost certainly be held to constitute excessive administrative entanglement. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985). Although *Regan* and *Wolman* held that direct aid to religious schools is constitutional when the aid does not support and cannot be diverted to the religious mission of the school, "the entanglement prong ensures that in most cases this very showing will result in a violation of the Establishment Clause." FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 52 (1995). However this state of affairs might be characterized, it is not neutral as between religion and nonreligion.

2. Entanglement exacerbates the tensions between the Free Exercise and Establishment Clauses by placing in question the constitutional legitimacy of exemptions obtained by religious individuals and groups through the political process.

Even as it abandoned the doctrine of judicially mandated exemptions for religion under the Free Exercise Clause, the Court affirmed the constitutionality of permissive exemptions — legislative and administrative exemptions granted to religious individuals and organizations even though the Free Exercise Clause does not require them. *Board of Educ. v. Grumet*, 114 S.Ct. 2481 (1994); *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); *see also Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (Title VII exemption for religious employers does not violate Establishment Clause). However, taking account of government-imposed burdens on religion unavoidably entangles government with religion; "a government that is not to some extent 'entangled' with religion is one that is indifferent to it." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 130 (1992); *accord* Donald Gianella,

Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement, 1971 SUP. CT. REV. 147, 171.

The entanglements entailed in crafting permissive exemptions are not trivial. Government officials necessarily must evaluate whether allegedly burdened religious conduct is in fact burdened; whether such conduct, if burdened, is in fact religious; whether such conduct, if religious, is deserving of an exemption from a general law; and whether an exemption for such conduct, even if deserved, is feasible in light of the legitimate goals of the law in question. Just as the need for government assistance may tempt parochial schools to compromise their religious missions to qualify for government assistance, so the need to convince government officials of burden, religiosity, sincerity, and feasibility may tempt any religious person or group to compromise religious beliefs or practices. Yet, if such evaluations by government were to be prohibited by entanglement, exemptions, if not eliminated altogether, would be limited to "long-established churches whose religiosity [is] universally conceded." Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 682-83 (1980). In that instance, new, unusual, or unpopular churches would find themselves unable to obtain such exemptions at all.

3. Administrative entanglement constitutes discrimination on the basis of religion in violation of the Equal Protection Clause of the Fourteenth Amendment.

Suspicion of government action that classifies on the basis of religion is rooted in the very origins of modern equal protection doctrine. *See United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (questioning the validity of the "presumption of constitutionality" in case of "statutes directed at particular religions"). Religious classifications have been subjected to strict

judicial scrutiny and invalidated under both religion clauses. *Church of the Lakumi Babylu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause); *Larson v. Valente*, 456 U.S. 228 (1982) (Establishment Clause); *see also McDaniel v. Paty*, 435 U.S. 618 (1978) (state constitutional provision prohibiting clergy from serving in legislature violates Establishment Clause).

As we have shown, administrative entanglement functions as a *de facto* denial of direct government aid to religious schools, solely because of the religious character of such schools. This denial of direct aid to religious schools may well be necessary to satisfy the compelling governmental interest of avoiding an Establishment Clause violation, if the government were not religiously neutral; that is, if it were to assist some religious schools but not others, or all religious schools, but not private secular and public schools. Such action might be justified for the same reason when aid is given directly to religious schools without controls to assure that it is used only for secular educational purposes. When, however, government financial or in-kind aid is made available to all on a religiously neutral basis under circumstances that ensure that it will not be used to teach or otherwise advance religion, there is no justification for denying to religious schools the equal protection of the laws.[6] As

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[6] *Cf.* Rectors of the Univ. of Va. v. Rosenberger, 115 S.Ct. 2510 (1995) (Establishment Clause does not justify denying evangelical student magazine reimbursement from university student activity fund on the same basis as other student publications); Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993) (same with respect to church access to public school facilities on same basis as secular groups); Widmar v. Vincent, 454 U.S. 263 (1981) (same with respect to student bible study and prayer group access to university facilities on the same basis as other student groups); *see also* Westside Comm. School Dist. v. Mergens, 496 U.S. 226 (1990) (upholding Equal Access Act's withholding of federal funds from public schools which deny approval of extra-curricular activities on the basis of their religious content).

Professor (now-Judge) Ripple cogently observed, "the policy considerations of entanglement must, at some point, meet the headwinds of equal protection. . . ." Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1205 (1980).

4. Political entanglement violates Establishment Clause neutrality by uniquely depriving religious individuals and groups of political and associational rights protected by the First Amendment.

Numerous scholars have criticized the political entanglement test because it devalues rights of political participation and association when these rights are exercised by religious individuals and groups. *See, e.g.*, Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 683-84 (1980); Edward McGlynn Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205, 230-31 (1980); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 346 (1986); Ripple, 27 U.C.L.A. L. REV. at 1226. In the very decision that spawned the entanglement prong, the Court observed that "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues," and insisted that "churches as much as secular bodies and private citizens have that right." *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970). Even so strong a proponent of entanglement analysis as Justice Brennan[7] strongly criticized use of political

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[7] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 408-14 (1985); Meek v. Pittenger, 421 U.S. 349, 373-84 (1975) (Brennan, J., concurring in part and dissenting in part); Lemon v. Kurtzman, 403 U.S. 602, 648-52 (1971) (opinion of Brennan, J.).

entanglement to deprive religious individuals and groups of fundamental constitutional rights. *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

B. To the extent that it invalidates church-state relationships which advance or inhibit religion, entanglement is redundant of the protection of religious voluntarism afforded by purpose and effect.

When invalidated government action violates the entanglement prong, it usually violates the purpose or effect prong as well. Peter Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 215 (1979). *Walz* itself described excessive entanglement as merely an effect that inhibits religion. 397 U.S. at 674; *accord* Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 349 (1986); Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1197 (1980); *see also Walz*, 397 U.S. at 692-94 (Brennan, J., concurring) (intrusion of state into affairs of churches resulting from taxation of church property would disfavor churches relative to analogous secular nonprofit associations in violation of effects prong). It is therefore unclear what entanglement adds to the analysis already supplied by purpose and effect. *See Aguilar v. Felton*, 473 U.S. 402, 430 (1985) (O'Connor, J., joined by Rehnquist, J., dissenting); *Roemer v. Maryland Bd. Pub. Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring).

For example, in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), the Court found that the delegation of municipal licensing authority to churches constituted political entanglement, *id.* at

127, but only after it had found that such delegation impermissibly advanced religion in violation of the effects prong. *Id.* at 125-26. Similarly, *Larson v. Valente*, 456 U.S. 228 (1982), suggested that a religiously discriminatory law constituted political entanglement after it had already determined that the law prescribed an impermissible denominational preference. 456 U.S. 246-55; *see also Board of Educ. v. Grumet*, 114 S.Ct. 2481 (1994) (legislative creation of school district whose boundaries precisely coincided with sectarian religious community held impermissible religious preference). Thus, because "the circumstances that give rise to excessive church-government entanglement also threaten violation of the Court's primary effect test," Peter Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 215 (1979), entanglement analysis is often redundant.

C. When it is not redundant, entanglement analysis depends on impressionistic judgments based on hypothetical facts.

The entanglement prong has contributed to the confusion in Establishment Clause jurisprudence in at least two ways. First, as we have explained, entanglement effectively denies most direct government aid to religious elementary and secondary schools on the ground that religion pervades every part of their activities and operations. By contrast, religious colleges and religious social service agencies are considered by the Court to be essentially secular entities. Aid to these entities is subjected to a more relaxed standard of review, with the result that most religious college and social service aid programs have been found not to violate the Establishment Clause. *See* Part I.C *supra*. Thus, "whether a religious group is classified as 'pervasively sectarian' is critical to the subsequent determination whether direct aid to

the group violates the Establishment Clause." FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 85 (1995).

Despite the critical importance of the pervasive/nonpervasive distinction, the nature of an aid recipient is often not documented by an evidentiary record or the subject of careful scrutiny by the Court. *See, e.g., Aguilar v. Felton*, 473 U.S. 402, 411-12 (1985); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Committee of Public Education v. Nyquist*, 413 U.S. 756, 767 (1973). The Court conclusively presumes that religious elementary and secondary schools are pervasively sectarian, *see e.g., Aguilar*, 473 U.S. at 411-12; *Grand Rapids School District v. Ball*, 473 U.S. 373, 384-85 (1985); *Nyquist*, 413 U.S. at 767-68, while there is a strong presumption that religious colleges and social service agencies, though religiously affiliated, are not pervasively sectarian. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988); *Aguilar*, 473 U.S. at 411; *Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 758-59 (1976). Social science data and other evidence suggests that both presumptions are inaccurate for large numbers of religious schools and colleges.[8] One commentator has characterized judicial understanding of religious elementary and secondary schools as an outdated description of Roman Catholic parochial schools in the 1950s. Peter Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 239-44 (1979). Others have questioned the accuracy of the

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[8] For a detailed review of the data and arguments, see FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 85-91, 169-74 nn.17-42 (1995).

Court's estimation of the sectarian influence at religious elementary and secondary schools.[9]

There is frequently no evidentiary basis for these presumptions. In *Aguilar* and *Grand Rapids*, for example, the Court feared religious indoctrination of religious school students by state instructional employees, despite the fact that the challenged programs in these cases had been in existence for many years without any evidence of such behavior. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 386, 388 (1985); *Aguilar v. Felton*, 473 U.S. 402, 428 (1985) (O'Connor, J., dissenting).

Second, when financial aid to religious schools is not accompanied by any means of assuring that it will not be used to advance religion, the Court has often estimated the likely effect of such aid and held the aid unconstitutional if it predicts this effect may advance religion. *See, e.g., Grand Rapids School District v. Ball*, 473 U.S. 373, 386, 397; *Meek v. Pittenger*, 421 U.S. 349, 370 (1975); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 779-80 (1973). In addition, it has often speculated that the sorts of government monitoring necessary to ensure that religion is not advanced would excessively intrude upon the religious aid recipient in violation of the entanglement prong. *See, e.g., Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Meek*, 421 U.S. at 370-72; *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). In either event, entanglement functions as a prophylactic against situations in which an impermissible purpose or effect

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[9] John Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61, 77 (arguing that even a very strong sectarian influence is unlikely to have any effect on employees who are paid, supervised, and evaluated by state agencies); William P. Marshall, *'We Know It When We See It': The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 525-26 (1986) (disputing that "providing counseling services in a particular building as opposed to across the street" affects the behavior of school counselors).

might occur. *E.g.*, *id.* at 624-25; *accord* Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1200-01, 1208 (1980).

When the Court employs entanglement as a prophylactic rule, it decides the constitutionality of a law "based upon a set of circumstances that does not exist." Gary J. Simson, *The Establishment Clause In the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 933 (1987). This is inappropriate in two respects. First, to speculate on the constitutionality of measures that might conceivably be adopted to ensure compliance with the purpose and effect prongs is merely to render an advisory opinion. *Id.* Second, this mode of analysis introduces an unacceptable degree of subjectivity into constitutional adjudication: "The degree of entanglement deemed 'excessive' often appears to be the product of personal judgments about certain religions and their institutions by a decision-maker who may or may not have any real exposure to the particular sect in question." Ripple, 27 U.C.L.A. L. REV. at 1218.

III. THIS CASE ILLUSTRATES THE DANGER AND REDUNDANCY OF APPLYING ENTANGLEMENT AS A DISTINCT TEST OF CONSTITUTIONALITY UNDER THE ESTABLISHMENT CLAUSE.

The immediate result of the Court's holding in *Aguilar v. Felton*, 473 U.S. 402 (1985), is that large numbers of educationally disadvantaged children were denied the benefits of a program of remedial assistance solely because they were attending religious schools. *Id.* at 419 (Burger, C.J. dissenting); *id.* at 431 (O'Connor, J. dissenting). The secular purpose of the assistance was undisputed, *id.* at 423 (O'Connor, J. dissenting), and the system of monitoring put in place by the state ensured that the assistance was not used to teach religion. The program failed

merely because the Court deemed this monitoring an excessive entanglement. *See, id.* at 409, 412-13.

That outcome cannot be squared with the neutrality principle. It is *not* religiously neutral to deprive children of secular educational benefits to which they are otherwise entitled, solely because they choose to attend private religious rather than secular public schools. For educationally disadvantaged children, the denial of these benefits constitutes a penalty on their decision to seek a religious education — a penalty that doubtless will influence at least some of them to return to public schools in order to recover those benefits. Entanglement thus has the indisputable effect of *undermining* religious voluntarism. The denial of benefits predicated on the religious character of the school the recipients attend constitutes a religious classification. In the clear presence of both a secular purpose and a primarily secular effect, that result cannot be justified as necessary to avoid a violation of the Establishment Clause. The instant case thus presents a stark illustration of the analytical bankruptcy of entanglement. In short, entanglement should be discarded as an element of Establishment Clause adjudication.

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,
Petitioners,

and

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

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BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*

Pursuant to Rule 37.3 of this Court, the Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioners.[1] The Becket Fund is a bipartisan and ecumenical public interest law firm that protects the free

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[1] All parties have consented to the filing of this brief. Letters of consent from all parties have been filed simultaneously with this brief.

expression of all religious traditions. Our cases frequently involve allegations of improper entanglement under *Aguilar v. Felton*, 473 U.S. 402 (1985). For example, we are currently preparing a petition for writ of certiorari in a case that will be captioned *Schundler v. ACLU*. In that case, the Third Circuit held, among other things, that a city's policy of including a broad array of religious elements—from a Hanukkah Menorah to a Hindu parade—in its various cultural offerings, and accompanying all such cultural efforts with a sign celebrating diversity, was an unconstitutional entanglement under *Aguilar*. *Schundler v. ACLU*, No. 95-5965, slip op. (3d Cir. Jan. 13, 1997).

Our present brief will address the utility of entanglement analysis for the Court's Establishment Clause jurisprudence. Because of this focus we believe our brief will complement, and not duplicate, the briefs of the parties and thus prove helpful to the Court in its resolution of this case.

SUMMARY OF ARGUMENT

Justice O'Connor recently warned that while it "is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause . . . . But the same constitutional principle may operate very differently in different contexts." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 2498-99 (1994). The Court has often remarked similarly—beginning in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), itself, where the Court stressed that:

> Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.

Id. at 612.

This advice is particularly apt when it comes to entanglement analysis, which too easily leads itself to circularity—entanglement is "excessive" because it is improper, and improper because it is "excessive." The military chaplaincy involves the government in a far greater number and complexity of contacts with religious organizations than did the zoning regulation in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). Yet the military chaplaincy is not only constitutionally permissible, it is probably constitutionally required. By contrast, the zoning regulation in *Larkin* "enmesh[ed] churches in the exercise of substantial government powers" and was therefore held to be an establishment of religion. *Id.* at 126.

In short, which interactions between Church and State are benign, and which are "excessive entanglements," cannot be determined reliably just from the extent of mutual contact. That conclusion depends instead on the propriety of the contact—which is itself the ultimate question in Establishment Clause analysis.

Aguilar-style entanglement analysis is unworkable for another reason. It requires inquiry into the Free Exercise rights of third parties, which taxpayer plaintiffs have no standing to raise.

The inhibition of religion is by definition not the establishment of it. Inhibition is instead its opposite. But *Aguilar's* finding of an unconstitutional establishment of religion was based largely on the possibility that monitoring Title I teachers would inhibit religious belief and practice.

This is problematic. The specter of "state inspectors prowling the halls of parochial schools," *Felton v. Secretary,*

United States Department of Education, 739 F.2d 48, 67 (2d Cir. 1984), *aff'd*, *Aguilar v. Felton*, 473 U.S. 402 (1985), is certainly ominous. However, it is ominous not to taxpayers, but to those whose religious freedom is thereby threatened—the parochial schools and the parents who choose to send their children to them.

But individual parochial schools are free to refuse any or all government aid which they feel is intrusive, or potentially so. Moreover, both parochial schools and their students are capable of enforcing their own Free Exercise rights should they be infringed. Taxpayer plaintiffs do not have standing to try to do it for them.

ARGUMENT

I. ENTANGLEMENT ANALYSIS SHOULD NOT BE USED AS A FREE-STANDING "TEST" UNDER THE ESTABLISHMENT CLAUSE.

A. The Court Has Emphasized That All Of Its Establishment Clause Inquiries Are "Guidelines," Not "Tests."

Justice O'Connor recently warned that while it "is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause . . . . But the same constitutional principle may operate very differently in different contexts." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 2498-99 (1994). Accordingly, she emphasized that "the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Id.* at 2499.

The Court has often made a similar point. It has stressed that "[i]n each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch v. Donnelly*, 464 U.S. 668, 678 (1984). *See also Walz v. Tax Commissioner*, 397 U.S. 664, 669 (1970) ("rigidity could well defeat the basic purpose"of the Religion Clauses). Thus, the Court has refused to invalidate mechanically every governmental action which somehow involves religion. Instead,

> the Court has scrutinized challenged legislation or official conduct to determine *whether, in reality, it establishes a religion or religious faith, or tends to do so.*

Lynch v. Donnelly, 465 U.S. at 678 (emphasis added, citation omitted). *See also Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 591 (1989)(quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947)).

To be sure, the Court has developed useful criteria to aid in this determination. At the same time, however, the Court has always emphasized that the utility of these criteria must be kept in perspective. The criteria "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pettinger*, 421 U.S. 359 (1975)(emphasis added, citation omitted). This is true of the "principal evils" identified in *Walz*: "sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668. The Court has noted that their presence cannot be measured with any "constitutional caliper." *See Tilton v. Richardson*, 403 U.S. 672, 677 (1971).

It is likewise true of the three criteria collected in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). In *Lynch*, the Court

reminded us that it is unwilling "to be confined to any single test or criterion in this sensitive area. In two cases, the Court has not even applied the *Lemon* 'test.'" 465 U.S. at 679. Since *Lynch*, the Court's refusal to be shoe-horned into a unitary approach to the Establishment Clause has been even more pronounced. Indeed, in two recent Establishment Clause cases, the Court has not cited *Lemon*. *See Rosenberger v. Rectors and Visitors of University of Virginia*, 114 S. Ct. 2551 (1995); *Capital Square Rev. and Advisory Bd. v. Pinette*, 115 S. Ct. 2440 (1995). The Court apparently found *Lemon* unhelpful in deciding *Lee v. Weisman*, 505 U.S. 577 (1992). Even more strikingly, the Court in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), noted that the Court of Appeals used the *Lemon* analysis, but then did not itself mention *Lemon* anywhere else in its opinion.

And where the Court *has* chosen to use the *Lemon* criteria—even in *Lemon* itself—it has called for circumspection. This is especially true in its use of entanglement criterion:

> Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.

Lemon, 403 U.S. at 614. *See also Roemer v. Board of Public Works*, 426 U.S. 736, 766 (1976)("[t]here is no exact science in gauging the entanglement of church and state"); *Hunt v. McNair*, 413 U.S. 734, 746 (1973)("the degree of entanglement arising from inspection of facilities . . . varies in large measure with the extent to which religion permeates the institution"); *Tilton*, 403 U.S. at 685 (various factors can "substantially diminish the extent and the potential danger of the entanglement").

In sum, this Court has taught that the ultimate inquiry is "whether, in reality, [the challenged conduct] establishes a religion or religious faith or tends to do so." *Lynch*, 465 U.S. at 678. Comparing the conduct to the "principal evils" isolated in *Walz* and to the three criteria set forth in *Lemon* may well be helpful in discerning the answer. But,

> [t]here are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. *The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.*

Tilton, 403 U.S. at 678 (emphasis added). The present case provides the Court with an excellent opportunity to re-emphasize that principle and thus clarify the proper role of entanglement analysis in Establishment Clause cases.

B. Entanglement Analysis Is Especially Ill-Suited To Serve As A Separate Test Because It Assumes Its Own Conclusion.

It is not only desirable that entanglement analysis not be regarded as a free-standing "test," it is also logically preferable. To do otherwise is to risk making a circular argument—"entanglement" is "excessive" because it is improper, and improper because it is excessive. Under this Court's cases, it is not the *quantity* of contacts between Church and State that make for excessive entanglement; rather, it is the *quality* of such contacts that matter. The military chaplaincy involves the government in a far greater number and complexity of contacts with religious organizations than did the zoning

regulation in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). So do the various programs established by the Adolescent Family Life Act ("AFLA"). *See Bowen* v. *Kendrick*, 487 U.S. 589 (1988). Yet the *Kendrick* Court upheld AFLA. And the chaplaincy programs set up by the various branches of the military are not only constitutionally permissible, they are probably constitutionally required.[2] By contrast, the zoning regulation in *Larkin* "enmesh[ed] churches in the exercise of substantial government powers" and was therefore held to be an establishment of religion. *Id.* at 126.

A casual observer would not say, in the colloquial sense of the word, that the City of Cambridge and the church near Grendel's Den restaurant had become entangled with one another. The only contact involved was the church filing a written objection to the granting of a liquor license. *Id.* at 118. But this contact, however fleeting, "vest[ed] discretionary governmental powers in [a] religious bod[y]", *id.* at 123, and thus was held to be an excessive entanglement. The same casual observer would almost certainly say, again in the colloquial sense of the word, that the military chaplaincy and AFLA are both quite entangling. But they are not improperly so.

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[2] *See School District of Abington Township v. Schempp*, 374 U.S. 203, 297 (1963)(Brennan, J., concurring); *Id.* at 309 (Stewart, J., dissenting); *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985)(holding that chaplaincy is constitutionally required to effectuate free exercise rights of service members and to preserve neutrality under the establishment clause). *Cf. Kiryas Joel*, 114 S. Ct. at 2492 (quoting Justice Brennan's statement in *Abington* that "[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion." *Abington*, 374 U.S. at 299 (Brennan, J., concurring)).

In short, which relationships between Church and State are benign, and which are "excessive entanglements," cannot reliably be determined merely from the extent of mutual contact. It depends instead on the propriety of the mutual contact—which is itself the ultimate question in Establishment Clause analysis. Accordingly, a court cannot reliably determine that a certain "entanglement" is "excessive" until after it has already decided, on some other basis, that the relationship is improper.[3] It is the *substance* of the contact between church and state, and not some quantum of interactions, that is determinative.

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[3]*Aguilar* has found itself cited in support of some unusual results in the lower courts. The Third Circuit recently cited *Aguilar*'s in striking down a display of a menorah and a creche that were part of Jersey City's year-round celebration of ethnic, cultural, and religious heritage, including such diverse events as Republic of India Day, Ramadan Remembrance Day parade, an African American Art exhibit, a Dominican Republic flag raising, and a St. Patrick's Day parade. *Schundler v. ACLU*, No. 95-5965, slip op. (3d Cir. Jan 13, 1997). The menorah and creche were accompanied, as were all of the city's cultural efforts, by a sign tying the display to a broader celebration of diversity. The court of appeals, however, relying on *Lemon* and *Aguilar*, held that Jersey City had, through its "overall plan to celebrate different religions and cultures . . . pursued a quintessential type of government action that 'fosters an excessive entanglement with religion.'" *Schundler*, Slip Op. at 26 (quoting *Lemon*, 430 U.S. at 613). A petition for writ of certiorari is currently being prepared by undersigned counsel.

Aguilar has likewise been cited in striking down regulations governing the use of the term "kosher" in consumer marketing, *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1340 (4th Cir. 1995) (although "the ordinance violated the second prong of the *Lemon* test . . . the principle defect of the ordinance lies in its creation of excessive entanglement)." *Cf. Bonham v. District of Columbia Library Admin.*, 989 F.2d 1242 (D.C. Cir. 1993)("to close the library on Easter . . . the District would be forced to decide matters of 'deep religious significance,' *Aguilar v. Felton* . . . .").

This is not to say that the entanglement criterion is simply a makeweight. It is not. Rather, it provides a valuable perspective on the totality of the circumstances. As the Court noted in *Lemon*, "involvement or entanglement between government and religion serves as a warning signal [in advance of] where the 'verge' of the precipice lies." *Lemon*, 403 U.S. at 624-25. A high degree of interaction between church and state is a helpful clue in a court's investigation. But it cannot be pressed into service as a free-standing "test."

II. *AGUILAR'S* ENTANGLEMENT ANALYSIS IS PARTICULARLY PROBLEMATIC.

Aguilar's entanglement analysis is unworkable for another reason. It requires inquiry into the Free Exercise rights of third parties, which taxpayer plaintiffs have no standing to raise.

A. Inhibition of Religion Violates, If Anything, The Free Exercise Clause, Not The Establishment Clause.

The inhibition of religion is by definition not the establishment of it. Inhibition is instead its opposite. But *Aguilar's* finding of an unconstitutional establishment of religion turned largely on the possibility that required government monitoring of Title I teachers could lead to the inhibition of religious belief and practice, or as the Court put it, the "more than an imagined specter of governmental 'secularization of a creed.'" *Aguilar*, 473 U.S. at 414 (quoting *Lemon*, 403 U.S. at 650). The *Aguilar* Court thus found an Establishment Clause violation in large part because of the

threatened inhibition of religion.[4]

This is problematic. The specter of "state inspectors prowling the halls of parochial schools," *Felton v. Secretary, United States Department of Education*, 739 F.2d 48, 67 (2d Cir. 1984), *aff'd*, *Aguilar v. Felton*, 473 U.S. 402 (1985), is certainly ominous. However, it is ominous not to taxpayers, but to those whose religious freedom is thereby threatened—the parochial schools and the parents who choose to send their children to them. Had the monitoring hindered the religious beliefs or practices of the schools at any time from the inception of the program in 1966, they could have brought suit under the Free Exercise Clause. As it is, neither the schools nor the schoolchildren's parents believe their religious liberty to be in peril. In fact, both the schools and parent-intervenors have defended the program from the beginning.

B. Taxpayer Plaintiffs Lack Standing To Assert The Free Exercise Rights Of Third Parties.

Aguilar thus presents the unusual circumstance of taxpayer plaintiffs bringing a challenge to a government program, and prevailing, not because the challenged program established, aided, preferred, or endorsed religion, but because it was said to threaten the religious liberty of third parties— who could not have disagreed more.

That result is in considerable tension with this Court's

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[4]While the Court noted in dicta in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), that "[i]n our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general," the Court has never found an establishment based on disapproval—except in its entanglement analysis *a la Aguilar*.

established doctrine on standing. Interested would-be plaintiffs cannot acquire standing by virtue of some "shared individuated right to a government" that does not prohibit the free exercise of religion. *See Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 482 (1982). Article III requires a real or threatened injury. *Id.* at 472. *Flast v. Cohen*, 392 U.S. 83, 104 n.25 (1968), expressly declined to decide whether an assertion of the free exercise claims of third parties would be sufficient to confer taxpayer standing. And in *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court rejected an attempt by plaintiffs to raise the free exercise rights of third parties. In that case, the Court held that appellants lacked standing because they

> allege[d] only economic injury to themselves; *they [did] not allege any infringement of their own religious freedom* due to Sunday closing . . . .

McGowan, 366 U.S. at 429 (emphasis supplied).

So too here. Plaintiffs' anxiety for what are best characterized as the free exercise rights of nonpublic schools and their students is misplaced. Individual parochial schools are free to refuse any or all government aid which they feel is intrusive. Moreover, both parochial schools and their students are certainly capable of enforcing their own Free Exercise rights should they be infringed. Taxpayer plaintiffs have no standing to try and do it for them.

In short, entanglement analysis, in general, is ill-suited for service as an Establishment Clause test, and *Aguilar's* version of it particularly so.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be reversed, and *Aguilar v. Felton* overruled.

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In The

Supreme Court of the United States

October Term, 1996

RACHEL AGOSTINI, ET AL.,

Petitioners,

v.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET ANO.,

Petitioners,

v.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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INTEREST OF *AMICI CURIAE*

The interest of each *amicus curiae* is set forth in the appendix to this brief. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

This case raises the question whether this Court should reopen and overrule its decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), which held that the Establishment Clause of the First Amendment prohibits the government from furnishing remedial education services to eligible parochial school children on the premises of their religious school. These *amici* agree with petitioners that *Aguilar* was wrongly decided and should be overruled in this proceeding.[1] However, these *amici* believe that the issue in this case extends well beyond the circumstances of the Title I remedial education program. *Aguilar* is not just an isolated or anomalous decision. It is representative of a line of holdings by this Court requiring that government assistance be denied to otherwise eligible individuals and organizations, solely on the basis that the assistance will be used in a setting in which religion will be taught or practiced. This line begins with *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and culminates in *Aguilar* and its companion case, *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985).

In the case of the Title I program itself, this approach has caused some of the neediest students in America to be denied remedial educational assistance, or to receive the assistance in ways that are both more costly and less

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[1] *Amici* agree with petitioners that it is appropriate to reopen *Aguilar* in this proceeding under Federal Rule of Civil Procedure 60(b) but leave discussion of that point to them.

effective. In other cases, children who attend religious schools have been denied a variety of educational resources that states wish to provide to all students on a nondiscriminatory basis. In each such case, the secular educational purpose of the states has been frustrated, and the students have been penalized for their exercise of a constitutionally protected right.

The constitutional evil is the same no matter what educational resource is denied to otherwise eligible students. Lines drawn between books and maps, textbooks and transportation, building maintenance and school lunches, tuition tax credits and tuition tax deductions, film projectors and computers, diagnostic and therapeutic services, and the like, are impossible to administer and have no basis in constitutional principle. The rights of students attending nonpublic schools should not depend on matters of form, but on the substance of the programs.

In the opinion of these *amici*, this Court should expressly adopt the teaching of recent cases, which in essence hold that government aid is constitutional under the Establishment Clause whenever (1) it serves a legitimate governmental purpose, such as education, (2) it is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, (3) it is made available to a broad array of beneficiaries, both religious and secular, on a nondiscriminatory basis, and (4) any religious element is the result of the genuinely independent and private choices of individuals and families. If an aid program satisfies these constitutional criteria, the government should not be required – indeed, it should not be permitted – to discriminate on the basis of the constitutionally protected choices of the students or the constitutionally protected speech and identity of the schools they choose. The government should be neutral.

The holding of *Aguilar* and like cases is not just an extreme application of sound principle; it turns the Religion Clauses on their head. Instead of neutrality, *Aguilar* requires discrimination. Instead of respecting individual choice and conscience, *Aguilar* places the weight of governmental power in opposition to religious education. Poor families eligible for Title I assistance are put to a painful and unnecessary choice: if they select the schools that, in their religious judgment, are most appropriate for their children, they forfeit benefits to which they would be entitled under law (or receive those benefits in a burdensome manner). This is a classic penalty on the exercise of a constitutional right, and should not be permitted (let alone required).

These *amici* believe the Court should take the opportunity of this case to return to the principle of "government impartiality, not animosity, towards religion." *Board of Education, Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring).

ARGUMENT

I. The Religion Clauses Should Be Read As Complementary Provisions Designed To Secure Religious Freedom By Preventing Government From Encouraging Or Discouraging Religion

The most fundamental problem in Religion Clause jurisprudence is to determine how the two religion guarantees, free exercise and non-establishment, interact. As many Justices of this Court have observed, at least some of the current doctrine interpreting the Free Exercise and Establishment Clauses appears to create a "tension" between the clauses. *Wallace v. Jaffree*, 472 U.S. 38, 81-82 (1985) (O'Connor, J., concurring); *Thomas v. Review Board*, 450 U.S. 707, 720-21 (1981) (Rehnquist, J., dissenting);

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973); *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970). The Free Exercise Clause plainly forbids Congress (and after incorporation in the Fourteenth Amendment, *any* government) to discriminate against religion. But the Establishment Clause has been interpreted, in cases such as *Aguilar*, to forbid any aid that will or even may be used to advance religious purposes. In a world in which the government aids or advances many different causes and institutions, this means that the government *must* discriminate against religion in distributing benefits. The Establishment Clause is said to require what the Free Exercise Clause forbids.

Amici believe that it is crucial for this Court to enunciate an interpretation of the Religion Clauses that is complementary and harmonious. The prohibition on establishments and the guarantee of free exercise do not mean opposite things. Rather, as Justice Goldberg put it, the two clauses "are to be read together, and in light of the single end which they are designed to serve": to "promote and assure the fullest possible scope of religious liberty and tolerance for all, and to nurture the conditions which secure the best hope of attainment of that end." *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

The Establishment Clause guarantees that government power will not be used to reward or induce the exercise of religion in general, or of any particular religion; the Free Exercise Clause guarantees that government power will not be used to penalize or inhibit the exercise of religion in general, or of any particular religion. Together, the Religion Clauses guard against the use of government power to control, interfere with, reward,

or punish the institutions, beliefs, and practices of religion. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001 (1990) ("[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."). *Amici* refer to this approach as one of "substantive neutrality" toward religion.

The framers of the First Amendment did not view the two parts of the Religion Clauses as separate and independent – let alone as mutually incompatible. The two principles were advocated with equal intensity by the same persons (particularly Baptists and other fervent Protestant sects) and for essentially the same reason: to diminish government power and control over religion.[2] The two clauses were a unified whole – "a double declaration of what Americans wanted to assert about Church and State." Thomas Curry, *The First Freedoms* 216 (1986).

While Madison, Jefferson, and other disestablishmentarians of the founding generation opposed the use of the government's taxing power for the *promotion* of religion, they never suggested that religious institutions be denied access to public benefits that are supplied on a nondiscriminatory basis. It is one thing to say that government may not tax citizens for support of a church, and quite another to say that, when government supports education, it must discriminate against schools that have

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[2] Initially, the sole purpose of the First Amendment Religion Clauses was to diminish *federal* government power over religion, leaving the several states with discretion to determine for themselves whether to establish a religion and what protection, if any, to provide for the exercise of religion. After incorporation through the Fourteenth Amendment, the First Amendment now applies to all levels of government.

a religious component. It is illogical to presume that, because the founding generation rejected *favoritism toward* religion, it must have favored *discrimination against* religion.

II. This Court's Decisions Regarding Assistance To Otherwise-Eligible Religious Individuals And Organizations Are Fundamentally Inconsistent And Create Conflicts Between The Free Exercise And Establishment Clauses

As Justice O'Connor has noted, Establishment Clause doctrine in cases involving government assistance to religious organizations has by now developed into two identifiable lines of cases. *Rosenberger v. Rector of Univ. of Virginia*, 115 S. Ct. 2510, 2525 (1995) (O'Connor, J., concurring). It is *amici*'s contention that these two lines are in irreconcilable conflict, and that one of them – the line of cases that includes *Aguilar* – should give way because it is also fundamentally inconsistent with the Free Exercise Clause.

In a line of cases including *Rosenberger* itself, and beginning with *Bradfield v. Roberts*, 175 U.S. 291 (1899), and *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court has permitted the participation of religious institutions and individuals in programs of assistance – cash, in-kind benefits, access to government facilities, tax benefits – so long as the terms of the program were neutral. For example, the Establishment Clause does not mandate that the government suppress or disfavor the expression of private individuals and groups simply because the expression is religious. *Capitol Square Review Board v. Pinette*, 115 S. Ct. 2440 (1995); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). Likewise, government may not, and certainly need not, disqualify individuals from receiving

government benefits simply on the basis that they choose to use them in a religious setting. *Rosenberger v. Rector of Univ. of Virginia*, 115 S. Ct. 2510 (1995); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dept. of Services*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). By permitting religious individuals and groups to speak and to share in general public benefits, the government avoids using its power in a discriminatory way to discourage religious expression or exercise.

The key question under this "governmental neutrality" approach is whether the government has favored religion over non-religion in setting or administering the program's terms. If the aid is "made available generally, without regard to the sectarian-nonsectarian, or public-nonpublic, nature of the institution benefited, and is in no way skewed towards religion," it does not violate the Establishment Clause. *Witters*, 474 U.S. at 487-88 (citation omitted). See also *Zobrest*, 509 U.S. 1; *Mergens*, 496 U.S. 226; *Texas Monthly v. Bullock*, 489 U.S. 1 (1989); *Mueller*, 463 U.S. 388; *Walz v. Tax Commission*, 397 U.S. 664 (1970).

These decisions rest on two premises. First, the Establishment Clause is not meant to " 'prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief.' " *Rosenberger*, 115 S. Ct. at 2521 (quoting *Everson*, 330 U.S. at 16). The Clause "prohibit[s] the government from favoring religion," but it "does not demand hostility to religion, religious ideas, religious people, or religious schools." *Board of Educ., Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring). Second, the "advancement" of religion that the Establishment Clause prohibits is only *government* action fostering religion. The Establishment Clause does not prohibit, and the Free Exercise and Free Speech Clauses protect, private religious speech and activity. "A law is not unconstitutional

simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987). In other words, this "government neutrality" approach coincides with the proposition that government should neither encourage nor discourage religion, relative to other activities and ideas.

This line of cases is in fundamental conflict with another line of cases, beginning with *Lemon v. Kurtzman* and culminating in *Aguilar v. Felton*, which insisted that the state must be "certain" that none of the resources provided to religiously affiliated institutions are used to "inculcate religion" (*Lemon*, 403 U.S. at 619). See, e.g., *Grand Rapids*, 473 U.S. at 385 (the Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *Levitt v. Committee for Public Education*, 413 U.S. 472, 480 (1973) ("the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination").

The underlying theory of this "no religious uses" approach is that taxpayers may not be compelled to support religious activity, even pursuant to neutral and generally available benefit programs. Since religious teaching and practice pervade many of the activities of religious schools, these cases have repeatedly denied even neutral aid, of undoubted educational value, to students in these schools.

Recently, the Court has more and more indicated its approval of the "neutrality" approach. In *Rosenberger*, for example, the Court stated that "a significant factor in

upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion," and it called this "[a] central lesson of our decisions." 115 S. Ct. at 2521. But the Court has also stopped short of rejecting the "no religious uses" position (see *id.* at 2523; *id.* at 2526 (O'Connor, J., concurring)). These *amici* believe that the two approaches are irreconcilable. It is not logically possible for the government to treat eligible recipients neutrally, neither favoring nor disfavoring religion, and at the same time insist that only purely secular uses be permitted. As we will discuss *infra* in Part III-A (pp. 15-23), any attempt to "compromise" between these two rules – applying one rule to some cases, and the other rule to other cases – is bound to produce the kind of arbitrary distinctions that have led many members of this Court to express dissatisfaction with Establishment Clause doctrine.

Amici urge this Court to adopt the "government neutrality" approach and explicitly repudiate the "no religious uses" approach for the whole range of cases involving governmental assistance. The proposition that activities receiving government funding must be cleansed of all religious elements or activity virtually ensures that religious schools or other religious organizations must be denied generally available aid solely on the basis of their religious commitments – precisely the discrimination forbidden by the Free Exercise Clause. It is the "no religious uses" that has turned the Establishment Clause, in practical effect if not in intent, into a principle of "hostility to religion" (*Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring)).

The approach of the *Lemon/Aguilar* line of decisions is at war with the most basic understandings of free exercise. To begin with, there is no doubt that seeking an education under religious auspices is a right protected

under the Free Exercise Clause. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788 (1973); see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In cases such as *Aguilar*, moreover, there is no doubt that individuals and schools are denied benefits solely because of the exercise of that right. If the students affected by *Aguilar* had attended private schools devoted to progressive politics, militarism, feminism, or Afrocentrism, the state would have been able to provide Title I remedial services to them on school premises. Because their school was religious, however, the students were denied the ability to receive these benefits on the same terms as other needy children.

This result strikes at the heart of the Free Exercise Clause, which, "[a]t a minimum," prohibits the state from discriminating against conduct "because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). And in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court stated that government may not "impose special disabilities on the basis of religious views or religious status" (*id.* at 877), and that any law or governmental action that is "specifically directed at . . . religious practice" is subject to "strict scrutiny" (*id.* at 877-78). This test involves "the most rigorous of scrutiny," as the Court said in *Lukumi*; "[a] law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." 508 U.S. at 546.

The Free Exercise Clause forbids the state from withholding a civil privilege or benefit on account of a person's exercise of religious freedom. In *McDaniel v. Paty*, 435 U.S. 618, 626 (1978), the Court held that a state may not "condition[ ] the exercise of one [right (in that case, the right to run for state legislative office)] on the surrender of the other" (the right to free exercise, in that case

the choice of a ministerial career). See also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (forbidding state to deny unemployment compensation to woman who refused to work on her Sabbath, because the denial of benefits "force[d her] to choose between following the precepts of her religion" and receiving otherwise-available benefits).[3]

The *Aguilar/Lemon* decisions deny educational resources to students attending religious schools that are provided to all similarly situated students who attend secular schools, whether public or private. The result is to use the state's funding power to put financial pressure on parents to forego their constitutionally protected right to educate their children in a religious setting. See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L. Rev. 989, 1017-22 (1991).[4]

The *Aguilar/Lemon* cases cannot be characterized as a mere refusal to subsidize the teaching of religion. They effectively penalize the exercise of religion by excluding religious individuals and schools from secular educational benefits for which they would otherwise qualify.

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[3] The same principles apply to the guarantee of free speech, including speech that is religious. Government may not deny a speaker benefits, including financial assistance, if the denial is based on the speaker's religious viewpoint. See *Rosenberger*, 115 S. Ct. at 2517-20; *Lamb's Chapel*, 508 U.S. at 393-94; *Widmar*, 454 U.S. at 268-70.

[4] We do not suggest that the government would be unconstitutionally discriminating against religion if it gave assistance only to public schools. The First Amendment prohibits discrimination against religion – not discrimination between government-operated and private institutions. The guarantee of neutrality is breached only when, as in the case of Title I, the government extends aid to students attending secular private schools while still withholding it from (or providing it in a burdensome fashion to) students attending religious schools.

See *Nyquist*, 413 U.S. at 784 n.39 (even if the primary effect of a program is "to promote some legitimate end under the State's police power," a program must be invalidated if it "also has the direct and immediate effect of advancing religion"); *Meek v. Pittenger*, 421 U.S. 349, 365-66 (1975) (holding that an otherwise permissible program must be held unconstitutional simply because it gives "[s]ubstantial aid to the educational function of [religious] schools"); *Grand Rapids*, 473 U.S. at 395 (forbidding "direct aid to the educational function of the religious school").

This is inconsistent with basic principles of constitutional law. As Justice William O. Douglas commented in an analogous context:

> The fact that government cannot extract from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.
>
> These considerations, however, are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-Day Adventist, but as an unemployed worker. . . .

Sherbert v. Verner, 374 U.S. at 412-13 (concurring opinion). By the same token, students eligible to receive federally funded remedial educational assistance will do so not as parochial school students, but as economically and educationally disadvantaged youngsters. They should not be denied educational assistance simply because they have chosen religious schools, any more than Mrs. Sherbert should have been denied unemployment benefits for

keeping her Sabbath. These *amici* do not claim that the government must subsidize *religion*, but do claim that, in subsidizing *education*, it must be neutral toward religion.

The distinction between a refusal to fund and a penalty is illustrated by two free speech cases. In *Cammarano v. United States*, 358 U.S. 498 (1958), this Court upheld a tax regulation forbidding business to deduct the costs of lobbying. The effect was to require businesses to bear the full costs of engaging in political activity; government simply refused to subsidize the activity through tax deductions. But in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court struck down a statute forbidding publicly subsidized broadcasters from editorializing, and withholding all federal funds to those that did. The statute went beyond refusing to fund editorials; a station was effectively "barred from using even wholly private funds to finance its editorial activity." 468 U.S. at 400.

The *Aguilar/Lemon* approach is analogous to that in *League of Women Voters*. There can be little doubt that religious schools contribute a secular educational value that falls within the scope of purposes of most educational assistance programs. As Justice Powell observed, religious schools "have provided an educational alternative for millions of Americans; and in some States they relieve substantially the tax burden incident to the operation of public schools." *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (concurring in part and dissenting in part). See Anthony S. Bryk, et al., *Catholic Schools and the Common Good* (Harvard Press 1993). Yet *Aguilar* and *Lemon* deny almost all aid to religious schools, even aid that matches and is limited to the educational value the schools provide. See McConnell, *Selective Funding*, *supra*, at 1017-22.

By contrast, the "government neutrality" approach is consistent with the nondiscrimination required by the Free Exercise Clause. This approach, indeed, harmonizes

the free exercise and nonestablishment principles around the central theme of minimizing government's influence over the decisions of the people with respect to religious matters. So long as the program of benefits is neutral and generally available, the fact that it is also available to religious individuals and organizations should create no inducement to religion. A neutral program creates no incentive to choose religious schools; "[i]f the subsidy is no greater than that given to students in secular schools, . . . [t]hose who choose religious education are neither better off nor worse off than those who prefer secular education." McConnell, *Selective Funding*, *supra*, at 1021. If Title I or some other form of aid is available to the same extent at both secular and religious schools, any incentive effects from government actions will be eliminated one way or the other. The decision about what school to attend will be left, as it should be left, to the family.[5]

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[5] The "neutrality" approach does not mean that any government action that takes religion specifically into account is unconstitutional. Some programs or statutes, called "accommodations of religion," single out religion for the legitimate purpose of removing obstacles to religious choice. See *Kiryas Joel*, 114 S. Ct. at 2492 (approving of such accommodations as long as they are neutral among sects); *Amos*, 483 U.S. 327 (upholding accommodation specifically targeted to religious organizations). The neutrality guaranteed by the Religion Clauses is not "formal," requiring that government always treats religion the same as other activities. Rather, it is "substantive" neutrality, requiring that government minimize the effect it has on religious practice. See Laycock, *Neutrality*, *supra*. A contrary understanding would produce the anomalous consequence that an accommodation of religion that promotes the purposes of the Free Exercise Clause might be deemed unconstitutional. See *Wallace v. Jaffree*, 472 U.S. at 81-82 (O'Connor, J., concurring). Under our proposed test, the "effects" test of the Establishment Clause prohibits only those

It may seem that the Court need not address the Free Exercise Clause in this case. The Elementary and Secondary Education Act already entitles students attending religious nonpublic schools to benefits comparable to those extending to their peers, and the only question is whether their eligibility for benefits violates the Establishment Clause. Nonetheless, the free exercise issue is central to the correct disposition of the establishment issue. The most powerful reason to reject the reading of the Establishment Clause set forth in *Aguilar* and *Lemon* is that it violates rights under the Free Exercise Clause. This approach must be overturned in order, in Justice O'Connor's words, to bring "Establishment Clause jurisprudence back to . . . the proper track – government impartiality, not animosity, towards religion." *Kiryas Joel*, 114 S. Ct. at 2498 (concurring opinion).

III. This Court Should Adopt A New Standard For Evaluating The Constitutionality Of Aid To Education, Based On Government Neutrality Toward Religion

A. The Great Weight Of Precedent Holds That Government May Extend Aid To Religious Schools On A Neutral And Nondiscriminatory Basis

This Court has held in case after case that the Establishment Clause is *not* offended when benefits are extended evenhandedly, under neutral criteria, to a broad and diverse range of viewpoints and activities. The second Justice Harlan stated the principle of government neutrality toward religion as follows:

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actions that give preferential treatment in a way that gives inducements or incentives to religious exercise.

> As long as the breadth of [the benefit] includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be anti-theological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit * * * to organized religious groups.

Walz v. Tax Commission, 397 U.S. 664, 697 (1970) (concurring opinion). To similar effect, Justice Brennan stated in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989), that "[i]nsofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." In *Witters v. Department of Services*, 474 U.S. 481 (1986), the Court held that aid does not violate the Establishment Clause if it is " 'made available generally, without regard to the sectarian-nonsectarian, or public-nonpublic, nature of the institution benefited,' and is in no way skewed towards religion." *Id.* at 487-88 (quoting *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 782-83 n.38 (1973)). See also *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2491 (1994) ("we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges"); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993) ("we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge"); *Lee v. Weisman*, 505 U.S. 577, 606 n.8 (Souter, J., concurring) (the Establishment Clause is not violated when "the State has, without singling out

religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria"); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384, 395 (1993); *Board of Education v. Mergens*, 496 U.S. 226, 248, 252 (1990); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981). Indeed, in the first of this Court's "school aid" cases, Justice Black warned that "we must be careful, in protecting the citizens * * * against state-established churches, to be sure that we do not inadvertently prohibit [the State] from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

While no majority opinion in this line of cases purports to supply a comprehensive set of criteria, these *amici* believe that these holdings can be distilled into the following: Aid is constitutional under the Establishment Clause if (1) it serves a legitimate governmental purpose, such as education, (2) it is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, (3) it is made available to a broad array of beneficiaries, both religious and secular, on a nondiscriminatory basis, and (4) any religious element is the result of the genuinely independent and private choices of individuals and families.

Under this standard, the Title I program is plainly constitutional. The remedial educational resources unquestionably are serving a legitimate governmental purpose (whether or not they also have an incidental beneficial effect on religion). The allocation formula used under Title I is based strictly on population and need, which are neutral and objective criteria. All students and essentially all schools are permitted to participate on a nondiscriminatory basis. Finally, since the decision to choose a religious or a secular school is exercised by the

family, it is apparent that any religious element in the education of the child is entirely a product of individual choice.

In conducting the constitutional inquiry, the Court should avoid three pitfalls that often characterized decisionmaking under the *Aguilar/Lemon* line of cases.

First, the Court should not allow the results of cases to hinge on contorted definitions of "direct" and "indirect" aid. The constitutional issue should be whether the decision to use aid in a religious setting is made by the individual or by the government. See *Zobrest*, 509 U.S. at 10 (because the aid "creates no financial incentive for parents to choose a sectarian school" over other options, it effectively ensures that assistance will be given to a sectarian school "only as a result of the private decision of individual parents" rather than as a result of "state decisionmaking"); *Rosenberger v. Rector of Univ. of Virginia*, 115 S. Ct. 2510, 2544-45 (1995) (Souter, J., dissenting) (noting that the Court's "indirect aid" cases "turned on the fact that the choice to benefit religion was made by a non-religious third party standing between the government and a religious institution").[6] When legislators or other government officials decide for themselves how much money to give to various recipients (as, for example, in the case of discretionary grants), there is reason to be concerned that government's decision will reflect favoritism rather than private choice – although the "per pupil" basis is not necessarily the only neutral measure. When school funds for schools are allocated on a per-

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[6] These *amici* agree with Justice Souter that the fact that the funds were sent directly to the printer in *Rosenberger* was of no constitutional significance. The important point in *Rosenberger* is that all decisions about editorial content (including religious perspective) were made by the individual students who participated in the activity. The government played no part in the decisions regarding *Wide Awake*'s religious point of view.

pupil basis, however, there is no danger of allocative distortion, and it should not matter whether, as a formal matter, the funds are sent first to the parents or to the schools.

In *Grand Rapids*, 473 U.S. at 395, the Court characterized a remedial and enrichment program similar to Title I as "direct," and thus as unconstitutional, but the program is essentially no different from that upheld in *Zobrest*: both place public employees (teachers in Title I, sign-language interpreters in *Zobrest*) in private schools in order to help the students there receive a better secular education.[7] Aid allocation decisions under Title I are based on a per pupil formula, derived on the basis of educational and economic disadvantage. See 20 U.S.C. § 6321(a)(1) (special education services shall be provided "on an equitable basis," "[t]o the extent consistent with the number of eligible children . . . enrolled in private elementary and secondary schools"); *id.* § (a)(4) (expenditures for private school children shall be proportional "based on the number of children from low-income families who attend private schools"). The proportion of the aid that flows to students at religious schools is thus a product of private choice; there is no danger of favoritism or discrimination by government officials. This is sufficient to make the aid "indirect" for constitutional purposes.

Second, the Court must examine the program *as a whole* to determine whether *the government* has behaved in

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[7] Indeed, the opinion in *Grand Rapids* seemingly used the terms "indirect" and "direct" as labels for forms of aid that the Court had upheld and struck down, respectively, rather than as having independent analytical content. See 473 U.S. at 393-94 (describing tuition tax benefits and loan of instructional materials as examples of "direct" aid to religious schools, and bus transportation and loan of textbooks as examples of "indirect" aid). This deprives the terms of any analytical content.

an appropriately neutral fashion, rather than focusing on specific applications of the program to see whether religion has been "advanced." So long as the government itself remains neutral, pursuing secular objectives and neither favoring nor disfavoring religion, it should not matter that individual citizens take advantage of the benefits of civil society to advance their religious objectives. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). The Court must "look[ ] to the nature and consequences of the program *viewed as a whole*." *Witters*, 474 U.S. at 492 (Powell, J. concurring).[8]

Third, the result should not be affected by the *form* of the aid. Many decisions between *Lemon* and *Aguilar* seemed to turn on whether the aid took the form of transportation, teachers' salaries, books, maps, film projectors, or school lunches. The theory seemed to be that only forms of aid that are "self-policing" – that require no continual monitoring to ensure that they lack any religious content – were permitted. This was necessary, the Court seemed to indicate, in order to satisfy the test of *Lemon* and *Aguilar* that there be "no religious uses" of the aid. The difficulty with this approach is that *every* input into nonpublic religious education has the effect of assisting both the religious and the nonreligious educational outputs. The distinctions therefore had no substance. Bus

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[8] In the context of aid to education, it is important to evaluate aid to nonpublic schools in light of the fact that the entire cost of public, secular education is paid by the state. See *Committee for Public Education v. Nyquist*, 413 U.S. 756, 801-803 (1973) (Burger, C.J., dissenting). It is misleading to define aid to public schools as one "program" and aid to nonpublic schools as a separate "program," and then to complain that the second program discriminates in favor of nonpublic schools.

transportation was approved in *Everson* because bus transportation is nonreligious. But unless children get to school they cannot receive religious education; the transportation was an essential input to the entire educational program of the religious schools. By contrast, maintenance and repair of classroom facilities were disapproved in *Nyquist* because religious teaching might take place in the classrooms. But ceiling tiles are no more inherently religious than buses, and require no more monitoring. If it is constitutional to pay for an ideologically neutral form of transportation to school, it should have been constitutional to pay for an ideologically neutral roof over the children's heads.

By the same token, provision of textbooks was approved if the books were not themselves religious (*Board of Education v. Allen*, 392 U.S. 236 (1968)), but teacher salaries were not because teachers might teach in a religious way (*Lemon*). The same was true of instructional materials, such as maps and film projectors. But books – no less than maps or film projectors – can be *used* in a religious way. And school lunches warm the bellies of poor children during catechism class no less than during physics. It is simply not the case that these approved forms of aid did not advance or assist in the religious education at these schools. If the Court were serious that no aid that could serve the religious function of the schools is permissible, all forms of aid should be struck down.

Amici think the Court was asking the wrong question in these cases. The question should not be whether the aid could benefit religious teaching, but whether the aid advances the government's secular purposes. If the government's secular purposes are advanced to the same degree in religious schools as in secular schools, it should be a matter of indifference to the government whether the

school's religious purposes are also advanced. Any such advancement is only an incidental effect. To be sure, if the religious aspect of a school's program necessitates a greater expenditure of money, or causes the government aid to produce a lesser secular benefit, then the religious school should receive a lesser subvention. Private persons should bear the entire marginal cost of the religious component of education. But if the religious school is equally efficient in accomplishing the governmental purpose (educating schoolchildren), then it should be equally entitled to public support. The government should neither *penalize* nor *reward* the private choice of a religious education. As one commentator has urged, the government should be permitted to aid religious schools on a neutral basis "so long as such aid does not exceed the value of the secular educational service rendered by the school." Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Cal. L. Rev. 260, 265-66 (1968). When aid is limited in this fashion, it transgresses no Establishment Clause values.

To use a simple example: If the government provides G.I. Bill benefits to all qualified ex-military personnel, this will have several effects. First and foremost, it will promote the legitimate governmental objectives of fostering education and promoting military service. Second, it will serve the private interests of the recipients, including enhancing their freedom of choice about what educational institutions they can attend. Third, for whatever fraction of the recipient group that chooses to attend religious colleges, it will enable the recipient to receive and the college to provide religious higher education. The latter effect is "incidental" to the government's purpose, but it is nonetheless a "direct" and "substantial" benefit. Such a benefit is an inherent and inevitable result of a neutral governmental program, and should be deemed no

more problematic than the fact that churches, along with everyone else, benefit from police and fire protection.

As Justice Brennan explained in his concurring opinion in *Texas Monthly*, 489 U.S. at 10: "The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur." The touchstone of constitutionality is that government aid must serve the legitimate, nonsectarian "aims of government." If it does so, the Establishment Clause is not offended merely because it also serves the overlapping, sectarian, interests of religious groups.

B. The Lemon Test Should Be Reformulated Or Abandoned

In *Grand Rapids* and *Aguilar*, this Court held that Title I and a similar program at the state level violated the "effects" and "entanglement" prongs of the *Lemon* test. In our judgment, those conclusions help to identify conceptual defects in the *Lemon* test, which should be corrected.[9]

Although several Justices have criticized the *Lemon* test, and the Court has in recent cases refrained from relying on it, the test has not formally been jettisoned and it remains the predominant standard applied by state and lower courts. See, e.g., *Kiryas Joel*, 114 S. Ct. at 2515 (Scalia, J., dissenting) (noting that the Court there ignored *Lemon* although all the lower courts had relied on it). This presents two serious problems for Establishment Clause

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[9] The other element of *Lemon* – that the law have a secular purpose – is easily satisfied in this case and in other cases involving educational aid to religious schools.

jurisprudence in lower courts, for the legislatures and other officials who must conform their conduct to it, and for the citizens whose rights are affected by it. The first is the uncertainty produced when a decision is neither overruled nor reaffirmed. Lower courts simply do not know what to do. Should they do as this Court says (*i.e.*, follow *Lemon*), and perhaps be overruled for it? Or should they do as this Court does (*i.e.*, ignore *Lemon*), and decide cases on the basis of whatever reasoning seems most pertinent to the particular case? Affected parties are similarly at sea. It is very difficult for legislatures, lawyers, and litigants to anticipate the outcome of Establishment Clause controversies when the operative doctrine is unknown.

Second, even if lower courts and legislatures assume that the *Lemon* test is still authoritative, the ambiguities and contradictions in its possible meanings leave lower courts and legislatures – as well as affected religious groups and individuals – in doubt about its meaning. In practice, the *Lemon* test has created unnecessary conflicts with free exercise rights and with the proper approach of government impartiality toward religion.

These *amici* think the Court should abandon the *Lemon* test, and replace it with a standard of substantive neutrality, as suggested above. But if the Court wishes to retain *Lemon*, *amici* submit that the test should be clarified and reformulated in order to prevent continued unnecessary and destructive conflicts between the principles of free exercise and nonestablishment.

1. The Effects Prong. The key prong of *Lemon*, and indeed of any Establishment Clause test, is the requirement that government action not have the "primary effect" of "advancing" or "inhibiting" religion. The problems with this part of *Lemon* arise not from its language, but from its interpretation. As explained above, in one

line of cases, this prong was interpreted to prohibit the use of government resources by private persons for religious purposes. That interpretation led to the discriminatory exclusion of religious people and religious institutions from otherwise neutral benefits programs. If the "effects" of government action are evaluated as proposed in the preceding subsection, the Establishment and Free Exercise Clauses would be harmonized.

The approach *amici* propose is also consistent with both of the prominent alternatives to the *Lemon* test propounded by members of this Court in recent cases: the "endorsement" test and the "coercion" test. The purpose of the endorsement test is to "preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). The nondiscriminatory administration of a general program of benefits conveys a message "of neutrality rather than endorsement" (*Mergens*, 496 U.S. at 248); conversely, exclusion of religious individuals or groups from neutrally available benefits " 'would demonstrate not neutrality but hostility toward religion' " (*Rosenberger*, 115 S. Ct. at 2525 (O'Connor, J., concurring) (quotation omitted)).

The analysis *amici* propose is equally compatible with the "coercion" test. The purpose of the coercion test is to ensure that the power of the government is not deployed to force or induce religious belief or behavior. See *County of Allegheny v. ACLU*, 492 U.S. 573, 659-663 (1989) (Kennedy, J., concurring in part); *Lee v. Weisman*, 505 U.S. 577 (1992). That is precisely the objective of the proposed test. The allocation of resources is an important element of governmental power; it must not be used to favor, or to disfavor, religious exercise. The provision of neutral benefits to religious persons and organizations avoids such

coercion, while exclusion places pressure on them to give up their constitutionally protected rights of religious exercise. The test *amici* propose thus bridges the gap between the endorsement and coercion standards, while correcting the ambiguities in the effects test of *Lemon*.

2. The Entanglement Prong. The *Aguilar* decision itself was based on the ground that supervision of Title I remedial education in religious schools would create "excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine." 473 U.S. at 409. But the proposed reformulation of the effects test removes the need for any objectionable church-state entanglement in this and most other neutral aid programs. The church-state contacts that would remain are minimal and of no constitutional significance.

The particular kind of entanglement that most concerned the *Aguilar* Court was the "ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought." *Id.* at 413. Such surveillance would be necessary to ensure both that religious teaching did not occur in Title I classes and that religious symbols would not be visible in those classrooms. *Id.* The Court concluded that " '[t]he picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental "secularization of a creed." ' " *Id.* at 414 (quoting *Lemon*, 403 U.S., at 650 (opinion of Brennan, J.)).

Amici strongly agree that it is objectionable for state officials to monitor a religious school for religious influences, and to require the school to eliminate or marginalize its religious character in order to qualify for government assistance. But the answer cannot be to violate rights of religious freedom in a different way by

barring assistance to religious schools and to the families that use them, thereby penalizing them for educating their children in an environment consistent with their faith. The "difficult dilemma" caused "by the interaction of the 'effects' and entanglement prongs" (*Aguilar*, 473 U.S. at 418) (Powell, J., concurring)) is a dilemma that simply does not have to exist. The objectionable entanglement is due entirely to the Court's insistence, under the "effects" test, that all religious teaching and other religious elements be eliminated from the programs that receive government assistance. If, as discussed above, the receipt of government assistance for secular value is permissible without regard to the religious teaching that is mixed into the program, then the government will not be required to monitor the school for religious content and this entanglement problem simply will not arise.

In addition, the interference with the organization's religious mission should not be the basis for suits by outsiders, as taxpayers, under the Establishment Clause. The victims of this form of unconstitutional activity are those being monitored. See 473 U.S. at 413 (noting that "religious school . . . must endure the ongoing presence of state personnel" looking for religious content). It makes no sense to allow this issue to be raised by the school's opponents in litigation, who can scarcely be said to have the school's interests at heart. To the extent (if any) that "entanglement" injures the interests of outsiders, it can more sensibly be assimilated within the "effects" test, as Justice O'Connor has suggested. *Id.* at 430 (O'Connor, J., dissenting). In other respects, entanglement should be recognized as a free exercise problem, and only the church school should be able to raise it. "An atheist plaintiff asserting a church's right to be left alone even at the cost of losing government aid is the best possible illustration of why there are rules on standing."

Douglas Laycock, *The Right to Church Autonomy as Part of the Free Exercise of Religion*, in 2 Government Intervention in Religious Affairs 28, 38 (D. Kelley ed. 1986).

As a second form of objectionable entanglement, the *Aguilar* decision cited the "administrative cooperation" between state personnel and school officials in other matters not directly implicating religious concerns, such as "schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program." 473 U.S. at 413. These contacts, of course, would continue even if the government ceased surveillance of the religious content of school programs. But there is nothing objectionable about these contacts. In the complex modern world there necessarily will be numerous interactions between government officials and religious institutions. The ideal of "separation of church and state" does not mean, and cannot mean, that church and government have no contact. As Justice O'Connor pointed out, "[t]he State requires sectarian organizations to cooperate on a whole range of matters without thereby advancing religion or giving the impression that the government endorses religion." *Id.* at 430 (O'Connor, J., dissenting).

On the one hand, "entanglement" is necessary for the state to enforce its civil and regulatory law. Education agencies impose and enforce myriad curriculum, attendance, certification, fire, and safety regulations, on sectarian schools, all of which involve some degree of "entanglement." *Jaffree*, 472 U.S. at 110 (Rehnquist, J., dissenting); see also *Hernandez v. Commissioner*, 490 U.S. 680, 696-97 (1989). On the other hand, "entanglement" is also necessary if religious institutions are to participate on equal terms in the benefits as well as the burdens of

public life. In short: not all interactions between church and state are problematical.

The non-ideological "administrative cooperation" over scheduling, information, and students' progress cited in *Aguilar* is unobjectionable. Indeed, the accreditation process for private religious schools entails no less "entanglement" than this. These contacts are no different in kind from the administrative cooperation and communication needed in the context of administration of the tax laws (*Hernandez*, 490 U.S. at 696-97; *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 394-95 (1990)) or wage and hour laws (*Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985)), which the Court has unanimously upheld. It cannot be true that administrative entanglement is significant when a religious institution shares in a government benefit but not when it shares in the burden of taxation or regulation.

Amici therefore suggest that, if *Lemon* is to be retained, the concept of "entanglement" be expressly limited to governmental supervision or second-guessing of private speech or of activities or decisions by officials of religious institutions that have religious significance. That was the primary concern of the *Aguilar* Court (see 473 U.S. at 409-10 (expressing concern over state involvement "in matters of religious significance" and in "sacred matters")); and other forms of contact between church and state are unavoidable and unobjectionable. As already noted, the need for government involvement in the religious elements of a religious school is eliminated or greatly reduced if the government is not required to

monitor every program receiving aid to ensure it does not contain religious content.[10]

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[10] The final form of entanglement identified by the *Aguilar* Court as a reason for barring aid to religious schools is the perceived danger of "political divisiveness along religious lines." 473 U.S. at 414; see *id.* at 416-17 (Powell, J., concurring). This doctrine has already been largely repudiated by this Court. *Lynch v. Donnelly*, 465 U.S. at 684 ("this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct"); see also *Bowen v. Kendrick*, 487 U.S. 529, 617 n.14 (1989); *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 339 n.17; *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).

APPENDIX

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus the **Christian Legal Society** ("CLS"), through the **Center for Law and Religious Freedom** (the "Center"), its legal advocacy and information arm, has since 1975 argued in state and federal courts throughout the nation for the protection of religious speech, association and exercise. Founded in 1961, CLS is an ecumenical professional association of 4,500 Christian attorneys, judges, law students, and law professors, with chapters in every state and at 85 law schools.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but

only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious liberty.

The **Association of Christian Schools International (ACSI)** is the largest association of evangelical Christian schools and colleges in the United States. Serving over 670,000 students, ACSI is dedicated to excellence in education that is Christian through the implementation of a Christ-centered philosophy of education. ACSI serves to promote professional excellence of teachers and administrators, a high level of student achievement and the rights of families with religious commitment to pursue biblically-based education for their children without the penalty of loss of public benefits available to American families generally. ACSI strives to stimulate continuous spiritual and professional growth of school personnel, while defending, and providing support for, religious schools and the rights of the schools' parents and students in the area of legal/legislative concerns. This case

articulates the legitimate need of religious school parents in trying to give their child the best education possible.

The **Catholic League for Religious and Civil Rights** is a nonprofit voluntary association, national in membership, organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life: The League is committed to ensuring the American people's continued enjoyment of the protections afforded religious freedom by the First Amendment to the Constitution, and it supports the religious freedom rights of Catholics and others through a wide range of activities.

The **Southern Baptist Convention** is the nation's largest Protestant denomination, with over 15.4 million members in over 38,400 local churches. **The Christian Life Commission** is the public policy agency of the Convention and is assigned to address religious liberty and other public policy issues. *Amicus* produces publications and seminars to educate Southern Baptists about ethical and moral issues in daily Christian life, and to advocate responsible Christian citizenship as part of biblical decision-making. *Amicus* also seeks to bring biblical principles and Southern Baptist convictions to bear upon public policy debates before courts, legislatures and policy-making bodies. *Amicus* frequently files briefs as *amicus curiae* in important religious liberty litigation, such as this case.

Family Research Council, Inc. (FRC), is a non-profit research and educational organization dedicated to the preservation and defense of traditional values and the family. FRC stands in defense of the principle that the religion clauses of the First Amendment do not require

discrimination against people or organizations based upon their religious speech or exercise. FRC seeks to support the rights of people of faith to participate as full and equal citizens in the public life of the nation.

Focus on the Family is a Colorado religious non-profit corporation committed to strengthening the family in the United States and abroad. Focus on the Family distributes a radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and other western countries. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. From its widespread network of listeners and subscribers, Focus on the Family receives an average of more than 33,000 letters each week and represents Americans numbering in the hundreds of thousands.

The **Lutheran Church-Missouri Synod** is the second largest Lutheran denomination in North America and the eleventh largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The congregations of the Synod operate approximately 2,000 elementary and secondary schools situated in most of the states of the United States. The Synod, on behalf of its congregations, schools, and individual members, objects to the denial or limitation of educational resources to children solely because those children attend religious schools.

The National Association of Evangelicals is a non-profit association of evangelical Christian denominations,

churches, organizations, institutions and individuals. It includes some 43,500 churches from 74 denominations and serves a constituency of approximately 27 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The **Southern Center for Law & Ethics** is a nonprofit, publicly funded, tax-exempt corporation founded in 1985 and based in Birmingham, Alabama. Paramount to the Center's purpose is to develop an understanding of the relationship between law and religion. The Center's activities include: interaction and instruction with interested law students, lawyers, and members of the academic community; publication of articles and a journal of theology and law; providing legal counsel; and filing *amicus curiae* briefs on a variety of public issues, from the free speech rights of college professors to the legal status of midwives, related to the Center's purpose.

The Center has an interest in ensuring that religious citizens are not penalized for the exercise of their fundamental religious and parental rights. The Center also has an interest in establishment clause case law that will respect the history and traditions of the American people. These interests are implicated by this case.

(13) (15)

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Supreme Court, U.S.
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OCTOBER TERM, 1996

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Petitioners,

v.

BETTY-LOUISE FELTON, ET AL.,
Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION, ET AL.,
Petitioners,

v.

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BRIEF AMICUS CURIAE OF THE UNITED STATES CATHOLIC CONFERENCE IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE UNITED STATES CATHOLIC CONFERENCE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The United States Catholic Conference ("USCC") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCC advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity, the rights of parents and children, the sanctity of life, and the importance of religious communities. Values of particular importance to the Conference are the protection of the first amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

This case offers this Court an opportunity to speak on several important issues. First, the case allows for a serious reexamination of the Court's Establishment Clause jurisprudence which, both in substance and in process, has failed to serve the history and purpose of the first amendment. That jurisprudence can better serve the genuine goals of both religion clauses, and begin to implement them

more consistently. Second, and more importantly, this Court can meaningfully advance the welfare of special needs children by endorsing appropriate and religiously neutral ways to advance their education consistent with their parents' religious and cultural values.

Through their counsel, the parties have consented to the appearance of this amicus.

SUMMARY OF ARGUMENT

For the nineteen years prior to 1985, pursuant to Title I of the Elementary and Secondary Education Act and its successive amendments,[1] the New York City Board of Education provided remedial education to economically and educationally deprived children in both public and private schools, including religiously-affiliated schools. This remedial instruction was provided on premises, in both public and private schools. By all reckoning, that program was a success, serving to further the educational development of those children most in need.

The Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), dramatically altered that program. In perhaps the strictest application of "separation" principles, a bare majority in *Aguilar* decided that these remedial education programs could not constitutionally survive on the premises of religious schools in spite

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[1] On July 1, 1982, the Elementary and Secondary Education Act ("ESEA") of 1965 was amended and superseded by the Education Consolidation and Improvement Act ("ECIA") of 1981. Pub. L. No. 97-35, 95 Stat. 463, Title V, Subtitle D (1981). 20 U.S.C. § 3801 (1982). Chapter 1 of the ECIA incorporated by reference most provisions of Title I of the ESEA which were the subject of this lawsuit when filed in 1978 and includes identical provisions governing participation of private school students. *See* 20 U.S.C. § 3803 (1982). On October 20, 1994 Congress again amended ESEA, resulting in the redesignation of the program as "Title I." Pub. L. No. 103-382, 108 Stat. 3518, Title I (1994). 20 U.S.C. § 6301 (1994). We will refer to the program throughout as "Title I."

of the fact that not a single instance, in 19 years, of improper attempts to inculcate religious beliefs at public expense, was ever demonstrated. *Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting). Following *Aguilar*, school authorities were forced to pursue alternative venues and techniques to provide those services to children who needed and were entitled to them, and who attended parochial schools. These techniques themselves have come under attack as being constitutionally deficient, by groups and individuals opposed to the provision of special education services in any but a public school setting. *See, e.g., Committee for Public Education and Religious Liberty v. Secretary, U.S. Dept. of Education*, 942 F.Supp. 842 (E.D.N.Y. 1996). At the same time, the development of this Court's Religion Clauses jurisprudence has grown away from *Aguilar*, and has made its deficiencies, with its singular reliance on *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), all the more clear. This Court should embark in a new direction, abandoning the flawed decision in *Aguilar* and the aptly-labeled *Lemon* test. This Court should do so in a way that sets out new parameters the Court can use to frame a more appropriate test, rooted in history and experience but capable of application to a range of contemporary problems.

First, such a test must provide for absolute impartiality of treatment for religion, and among religions. In order to do so, two interests must both be served, rather than spuriously seeming to be weighed against each other. Personal religious liberty must at all times be protected from encroachment by the state, and the institutional autonomy of both governmental and religious institutions must not be impinged upon. Neither must be permitted to intrude into the institutional prerogatives of the other.

Second, these interests should be protected by demanding that the challenger of the action in question, as in all other civil litigation, bear the burden of demonstrating that a claimed violation of the Establishment Clause has in fact occurred. In *Aguilar*, the burden was essentially placed on those defending the program to prove that public employees could never convey a religious message in delivering Title I services, without constant surveillance arising out of the state's efforts to supervise its own employees who were providing these services. *Aguilar*, 473 U.S. at 413. That supervision,

in and of itself, was seen in *Aguilar* as violative of *Lemon*'s entanglement test.

The state's affirmative obligation to accommodate religion, not take a position hostile to religious belief itself, must be clearly recognized. By using these standards as a benchmark, then, the Establishment Clause can here be understood in a coherent way. Applying these standards here will not only result in the reversal of *Aguilar* but set a course for future jurisprudence that allows for the vindication of the authentic goals of both Religion Clauses.

ARGUMENT

I. *Aguilar v. Felton* Has Institutionalized Significant Jurisprudential and Educational Deficiencies.

This Court has a chance to undo a decision that has been as damaging in its implications for religious/state relationships in this country, as it has been damaging to the educational interests of the economically needy and educationally disadvantaged students whose parents have chosen to send them to religiously affiliated schools. In *Aguilar*, this Court decided that the Establishment Clause prohibited the provision of Title I remedial educational services to children entitled to receive these services, on the premises of their own schools, if those schools happened to be religiously affiliated. In large part it did so because it concluded that a violation of the "entanglement prong" of the *Lemon* test would "inevitably result" from the public school board's monitoring of its *own* teachers, who were providing services on the premises of parochial schools. *Aguilar*, 473 U.S. at 409. In the intervening years, both the jurisprudential and educational goals of the country have suffered. Here, the Court can -- and we submit, must -- make things right.

A. *Aguilar* Is Inextricably Rooted in *Lemon*, and Its Suspect Interpretation of Constitutional Text and Principle.

It is clear from this Court's decision in *Aguilar* that that decision depends, first and last, on the authority of the tripartite test

announced in *Lemon v. Kurtzman*. Application of the three-part *Lemon* test resulted in the Court's decision that the state's own supervision of its own publicly-employed special education teachers conducting remedial education in religious schools constituted "excessive entanglement" of church and state. *Aguilar*, 473 U.S. at 409. *Lemon* does not do legitimate service to the constitutional text. It skews the analysis against beneficial and constitutional cooperation between government and religion, as measured by history and experience. *Aguilar* should be overturned because it depends on *Lemon*, and the test enunciated in *Lemon* should be reconsidered and reformulated along the lines suggested here. The factual circumstances of *Aguilar* presented no threat at all of establishment or preference of any particular religion. Rather, the *Aguilar* decision demonstrates affirmative "hostility toward religion and the children who attend church-sponsored schools." *Aguilar*, 473 U.S. at 420 (Burger, C.J., dissenting).

Lemon itself has long been subject to criticism as excessive and unsupportable.[2] Many members of this Court have joined in this criticism. From the time *Lemon* was decided, in fact, members of the Court have criticized the test as not being a particularly useful or principled way of deciding cases. *Lemon*, 403 U.S. at 668 (White, J., concurring in part, dissenting in part). In *Wallace v. Jaffree*, 472 U.S. 38 (1985), Chief Justice Rehnquist wrote that "[these] difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the ["]wall["] theory upon which it rests. . . .The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this

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[2] *Lemon* has come under broad-ranging criticism in the academic legal community, and for a variety of reasons. *See, e.g.*, Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795 (1993); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 127-34 (1992); Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645, 654-60 (1992); Mary Ann Glendon & Raul Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 503, 538 (1991).

Court to fracture into unworkable plurality opinions. . . ." *Id.* at 110 (dissenting). Justice Kennedy has indicated that an overall revision of the Court's Establishment Clause jurisprudence "may be in order." *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 656 (1989) (concurring in part and dissenting in part). Justice O'Connor has pointed out the particular problems which application of the *Lemon* test creates, when the issue is what steps the government can take to accommodate the exercise of religion without at the same time violating the Establishment Clause. *Corporation of Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346 (1987) (concurring in judgment), as well as criticizing the *Lemon* test as being, in and of itself, excessively rigid and insensitive to the demands of constitutional litigation. *Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S.Ct. 2481, 2500 (1994) (concurring and concurring in judgment). Justice Scalia has also criticized the *Lemon* test. *See Edwards v. Aguillard*, 482 U.S. 578, 613-19 (1987). Justice Souter has voiced his concern that the *Lemon* test, as applied, may be in direct conflict with the Free Exercise Clause. Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before The Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 156 (1990) (statement of nominee). In his opinion for the Court in *Kiryas Joel*, 114 S.Ct. at 2487-2494, Justice Souter eschewed *Lemon* in favor of an analysis of the facts and circumstances of the case.

Lemon has led to results in individual cases, particularly in the area of education, that are inconsistent and conflicting. *Wallace*, 472 U.S. at 110-11 (Rehnquist, J., dissenting). The focus of this brief, however, is not only on achieving a different result in the instant case, but also upon the process this Court utilizes in scrutinizing challenges brought under the Establishment Clause. That Clause demands that the Court must have a means to distinguish "real threat" from "mere shadow." *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)). Those means must also be rooted in what history and experience teach are the goals and values of the constitutional text. *See Lynch v. Donnelly*, 465 U.S. 668, 673-76 (1984). It is a text of enormous complexity requiring

care and sensitivity in its application.[3] *Lemon* has utterly failed to provide that procedural vehicle. It weights the scales of justice against legitimate and benign cooperation undertaken in the public interest. In *Aguilar*, it allowed the invalidation of an important public program without any evidence of actual harm.

Each prong of the *Lemon* test is problematic. On its face, the search for "secular purpose" seems uncontroversial. In many circumstances the Court simply looks to the goals sought to be achieved as stated by the legislature. But in religion cases, *Lemon* invites judges to do more, searching not just the legislature's motives but those of individual legislators as well.[4] The second, "primary effect," prong, clearly manifests a distrust of religious organizations to function properly within the confines of a governmental program. For example, in *Lemon* the Court concluded that the religious nature of the institution providing the services, by itself, demonstrated that the statute had the primary effect of aiding religion. *Lemon*, 403 U.S. at 635 (Douglas, J., concurring). The Court reasoned that all functions of a religious institution, whether a school or a social service agency, are committed to the inculcation of religious beliefs. By linking one function of a religious institution with all of its others, the Court assumed that religious organizations could not keep their

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[3] Acts of Congress should not be invalidated absent "clear incompatibility" with the Constitution. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1871).

[4] *See, e.g., Wallace*, 472 U.S. at 56-58 (hinging its conclusion on fact that legislature had no secular purpose, based on the views of the principal sponsors). For the most part, the Court has deferred to the legislative findings and purposes that are reflected in the statute. *See Pacific Gas and Elec. Co. v. Public Utils. Comm'n.*, 475 U.S. 1 (1986). The basic rule of statutory construction is to disregard views of individual legislators (even sponsors) as definitive interpretative guides. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311-12 (1979); *see also United States v. Public Utils. Comm'n.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) (stating that the Court should avoid "psychoanalysis of Congress").

various missions and goals separate. *Id.*[5] That conclusion of constitutional significance has had disastrous consequences for the education of our nation's neediest children.

It has always been recognized that the third facet of the *Lemon* test, "excessive entanglement," is inherently "insolubly paradoxical." *Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in judgment). This "Catch-22" effectively creates a presumption of invalidity in cases having to do with governmental aid programs involving religious schools. *Aguilar*, 473 U.S. at 420 (Rehnquist, J., dissenting). This presumption, and the inversion of the usual burdens of proof in the civil case which was its concomitant in *Aguilar*, have also been roundly criticized. *See, e.g.*, Glendon and Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. *supra at* 510-514. This presumption of invalidity arises from the way the *Lemon* test was enunciated. The test stated in *Lemon* was not limited to the actual issue presented there, the propriety of direct government supervision of officials of a religious institution. *Lemon*, 403 U.S. at 619-20. Rather, *Lemon* broadly condemned all "entanglement," whether merely administrative, substantive, or even entirely "prophylactic contacts" having no purpose whatsoever except to *ensure* that teachers were not teaching religious beliefs or doctrines when they were to be teaching government-funded secular material. *Lemon*, 403 U.S. at 619. By finding "entanglement" even though the Court agreed that only potential but not actual hazards had been shown, *id.* at 618, it virtually conclusively presumed that whenever a government aid

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[5] From time to time, this Court has employed the rubric "pervasively sectarian" to mean an institution in which religious proselytism and instruction could not be distinguished from secular education. That terminology itself shows a marked hostility towards religion and contributes to the jurisprudential problem underlying this case. Richard Baer, *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J. Law & Politics 449 (1990). The focus should not be the institution but the program of cooperation, and how the institutional cooperation utilizes public funds. *Bowen v. Kendrick*, 487 U.S. 589, 624 (1988) (Scalia, J., concurring).

program involving parochial schools was at issue, that program would violate the Establishment Clause.[6]

All of these concerns, distilled by Justice O'Connor's recognition in *Aguilar* that the *Lemon* test had indeed condemned benign cooperation between church and state, *Aguilar*, 473 U.S. at 421 (O'Connor, J., dissenting), show that new parameters must be used to evaluate the constitutionality of governmental actions in cases that raise Religion Clauses issues.

B. *Aguilar* Has Created Significant and Expensive Difficulties, Harmful Both to Needy Children and the Common Good of Our Society.

The *Aguilar* decision was made in the face of proof in the District Court that the on-premises program had, in Justice O'Connor's words, "over almost two decades . . . . helped thousands of impoverished parochial school children to overcome educational disadvantages without once attempting to inculcate religion." *Aguilar*, 473 U.S. at 431 (O'Connor, J., dissenting). Concurring in the opinion in *Aguilar*, Justice Powell conceded that the educational programs in question there had "done so much good and little, if any,

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[6] Simply abandoning "excessive entanglement" is, however, not a solution. In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court rewrote its Free Exercise Clause jurisprudence generally but attempted to leave intact its caselaw immunizing church internal operations, doctrine, and polity from secular court scrutiny. *Id.* at 876-78. Some of that caselaw involves decisions that involvement of a state regulator, for example, in a particular matter in a religious institution, would "excessively entangle" the state in the governance of a church. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501-7 (1979); *see also Schmidt v. Bishop*, 779 F.Supp. 321, 327-9 (S.D.N.Y. 1991). These cases are examples of "free exercise," not "establishment," concerns. But revision of the test, as suggested here, should avoid creating more harm to the body of law protective of religious institutions, a principle on which this Court has always correctly persisted.

detectable harm," echoing the Second Circuit's decision below in *Felton v. Secretary, U.S. Dept. of Education*, 739 F.2d 48, 72 (1984). *Aguilar*, 473 U.S. at 415. At the same time, the *Aguilar* decision led to extraordinary costs on the part of school districts nationwide as they attempted to comply with the decision and provide these services in ways not prohibited under *Aguilar*, as well as to much additional litigation attempting to fix its boundaries and its meaning.

Aguilar created major logistical and educational problems in delivering Title I services to private school children, resulting in fewer children receiving remedial services.[7] Following *Aguilar*, participation of private school children in the Title I program dropped precipitously as school districts scrambled to provide alternative methods to deliver those services. Before *Aguilar*, states served 185,000 private school students. After *Aguilar*, the number declined by 62,000 children.[8] In addition, the quality of those services also became inferior to those provided pre-*Aguilar* and to those provided to public school children. Alternative delivery systems have included mobile vans parked on public streets, portable classrooms on neutral sites, instruction in public school buildings, and computer-assisted instruction in private schools with no instructional personnel present.[9] Requiring students to leave their regular schools and travel

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[7] U.S. Department of Education, *Statement of the Independent Review Panel of the National Assessment of Chapter 1*, 57 (1993).

[8] General Accounting Office, *Aguilar v. Felton Decision's Continuing Impact on Chapter 1 Program*, 5 (GAO/HRD-89-131BR, 1989).

[9] A. Russo, M. Haslam, *The Uses of Computer Assisted Instruction in Chapter 1 Programs Serving Sectarian Private School Students*, 17, 57-58 (U.S. Dept. of Education, 1992). Computer assisted instruction also has its problems. It is not well integrated with regular school programs, frequently neglects staff training and support, and is used primarily for drill and practice in basic skills. *Id.* at iii. The contribution of computer assisted instruction to students' intellectual development and

to locations off-site interrupts the educational process, creates safety concerns, and causes undue hardship on children.

Most importantly, even for those children who continue to receive services, *Aguilar*'s continuing detrimental impact is that it exacerbates the educational deficiencies of the children most in need of help. Requiring services to be off-premises adds another layer of disruption to the school day, requiring children to travel to alternative education sites for their remedial instruction or receive less effective instructional techniques. This further disadvantages these children and further derogates the public interest in serving them. It is a disservice to the public interest to invalidate in-school programs which promote real educational, economic, and social values, and do not, except by arrant speculation, in any way establish religion.

Following *Aguilar*, Congress attempted to ameliorate the problems that *Aguilar* created. 20 U.S.C. § 2727(d).[10] Between 1988

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improved achievement is limited. *Id.* at 23.

[10] The Senate Labor and Human Resources Committee reported:

> To comply with the Supreme Court's decision [in *Aguilar v. Felton*], schools have had to implement costly, disruptive, and creative procedures to serve private school children.
>
> The Committee strongly believes that these eligible children should be served. Service to eligible private school children has been a provision in law since its enactment in 1965. The Committee is very concerned that efforts to comply with the Supreme Court ruling have resulted in a decline of about 35 percent in the number of private school children who are served.

S. Rep. No. 100-222, 100th Cong., 1st Sess. 14, *reprinted in*, 1988 U.S. Code Cong. & Ad. News 101, 114.

and 1993, Congress had appropriated over $180 million to help defray the cost of capital expenses associated with alternative delivery methods, such as mobile vans, and the leases of neutral sites necessitated by *Aguilar*,[11] money that could better have been used to provide instructional services to both public and private school students. Instead, the costs for alternative delivery methods decrease the amount of funds available to provide instructional services for all students, regardless of where they attend school.

What followed, predictably, was a spate of new litigation which focused on the use of government-controlled mobile vans being used for remedial education classrooms, other alternative teaching methods, and the methods of cost allocation. A Missouri district court invalidated both the parking of mobile vans on school property, and the method of accounting for any additional costs to provide these services. *Pulido v. Cavazos*, 728 F. Supp. 574 (W.D. Mo. 1989). The district court came to the conclusion that a van

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[11] M. Haslam, D. Humphrey, *Chapter 1 Services to Private Religious School Students*, 41 (U.S. Dept. of Education, 1993), (approximately $161 million had been appropriated for capital expenses for fiscal years 1988-93). Subsequently, Congress appropriated additional funds for capital expenses: $41.434 million for fiscal year 1994, Pub. L. 103-112, 107 Stat. 1082, 1101 (1993); $41. 434 million for fiscal year 1995, Pub. L. 103-333, 108 Stat. 2539, 2562 (1994); and $20 million for fiscal year 1996, Pub. L. 104-56, 109 Stat. 548 (1995). Perhaps appropriately, the extra costs required to provide remedial education to needy parochial school students as a result of this Court's decision in *Aguilar* have become known as "*Felton* costs." These "*Felton* costs' had to be taken "off-the-top" of a state's allocation of funds in order to provide actual services equitably to all needy students. If these costs were not taken off the top of the allocation of Title 1 funds, but instead were assessed against the private school students' share of Title 1 funds, services might have to be discontinued for a year or more. Many students would be unserved or would simply be forced to leave their private schools.

parked directly in front of a parochial school, just a few steps from the entrance, but outside the school's property line, was constitutional, while a van parked across campus, out of sight of the school's entrance, but on land owned by the school, violated the first amendment. *Id.* at 587-93. On appeal, the Eighth Circuit upheld both the use of mobile classrooms, no matter where parked, as well as the cost allocation method. *Pulido*, 934 F.2d 912 (8th Cir. 1991). By contrast, a Kentucky district court upheld the delivery of services in off-premises mobile vans but invalidated the method of cost allocation. *Barnes v. Cavazos*, No. C80-0501-L(A) (W.D. Ky. Feb. 21, 1990). The Sixth Circuit upheld the actual dollar allocation of costs, based solely on the facts in that case, but did not address the van placement issue. *Barnes*, 966 F.2d 1056 (6th Cir. 1992).

In yet another of *Aguilar*'s progeny, a district court concluded that property boundaries do have constitutional significance for placement of mobile vans. *Walker v. San Francisco Unified School District*, 761 F. Supp. 1463, 1469-71 (N.D. Cal. 1991). But the *Walker* court supported the constitutionality of the method of financing. *Id.* at 1472. On appeal, the Ninth Circuit in *Walker* held that the provision of Title I services in vans parked on parochial school premises did *not* violate the Establishment Clause, and neither did the monitoring of Title I teachers by their public-employee supervisors. *Walker v. San Francisco Unified School District*, 46 F.3d 1449 (1995). In *Board of Education v. Alexander*, 983 F.2d 743 (7th Cir. 1992), the Seventh Circuit resolved a similar challenge to the way in which so-called "*Felton*" costs were taken off the top of a total agency allotment under Title I, holding that that did not violate the Establishment Clause.

Clearly, the continuing litigation of these questions, arising as it does from *Aguilar*, has also had an adverse impact upon the overall Title I program. That, and the adverse educational consequences of off-premises teaching methods, reinforce the conclusion that *Aguilar* must be overturned and the *Lemon* test reformed.

II. A New Approach to the Interpretation of the Establishment Clause Must Be Undertaken Here.

This Court has regularly insisted upon history and experience as its only reliable guides in the interpretation and application of the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 673-76 (1984). Unfortunately, consideration of the meaning of the Religion Clauses frequently begins and ends with reference to Thomas Jefferson's "wall of separation" between church and state.[12] "The concept of a 'wall' of separation is a useful figure of speech. . . [b]ut the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." *Lynch*, 465 U.S. at 673. It is often forgotten that the Religion Clauses were themselves political compromises forged by persons of different cultural, religious and regional experiences. No one or another view predominated in fact. Even if Jefferson were the benchmark, Jefferson's view of religion and the state was one in which religion played a central role in the order of society. Although Jefferson opposed the establishment of any religion, he and other founders believed that the interaction of religion and state brought about and preserved moral values which were essential to civil government. Jefferson, like others of his contemporaries, believed that religion was important in the public and private lives of the citizens of the state.[13]

The history of the drafting and negotiations that led to the wording of the Religion Clauses as finally adopted by the First Congress is detailed in many texts. *See* Chester J. Antieu, *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses*, 187-8 (1964). The process of extensive compromise that resulted in the Establishment Clause–

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[12] *See McCollum v. Board of Education*, 333 U.S. 203, 244 n.8 (1948) (Reed, J., dissenting) (quoting 1802 Letter to Danbury Baptist Churches in 8 *The Writings of Thomas Jefferson* 113 (Washington ed., 1861)).

[13] PROCEEDINGS, EARL WARREN CONFERENCE ON ADVOCACY, CHURCH, STATE AND POLITICS 79 (1981).

shows that it had two specific purposes: first, to prevent Congress from establishing or favoring a *national* religion; and second, to prevent Congress from interfering with the *states'* policies with regard to religion.[14] The Framers of the Constitution, however, "had no fear or jealously of religion itself, nor did they wish to see us an irreligious people . . ." S. Rep. No. 376, 32d Cong. 2d Sess. 4 (1853) (appointment and compensation of legislative chaplains); *see also Zorach v. Clauson*, 343 U.S. 306, 312 (1952) ("The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State"). There was no concern expressed during the first congressional debates that the government might enact a law beneficial to religion or religious institutions. 1 ANNALS OF CONGRESS 730-31 (Gales & Seaton eds. 1789).

History indicates that the Establishment Clause was intended to prohibit the preference of one religion over another; it did not forbid any assistance, regulation, or other interaction. Clearly the Framers of the Religion Clauses in the First Congress allowed some state involvement with religion, including payment for chaplains, *Marsh v. Chambers*, 463 U.S. 783, 788 (1983), a Thanksgiving Holiday, *id.* at 788, and inclusion of churches in land grants in the Northwest Territories, *Wallace*, 472 U.S. at 100 (Rehnquist, J., dissenting). Benevolence toward religion was not perceived as an evil. Rather, support and encouragement of religion was perceived to be in the public good.

Into the sixteen simple words of text,[15] the First Congress

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[14] 1 ANNALS OF CONGRESS 730-31 (Gales & Seaton eds. 1789). At the time of the Constitutional Convention, there was a wide diversity of views and practices among the states regarding established religion. *See* 3 J. Elliot, DEBATES OF THE FEDERAL CONSTITUTION 330 (2d ed. 1836) (Madison's discussion of freedom of religion in Virginia).

[15] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...." U.S. Const. amend. I.

subsumed centuries of contention about the appropriate relation between religion and government. The Religion Clauses reflect the experience of their Framers that an officially preferred or nationally established religion generates religious intolerance and infringes upon personal liberty. *See, e.g., Abington Township*, 374 U.S. at 228 (Douglas, J., concurring); *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). The Establishment Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious liberty. *See Lynch*, 465 U.S. at 683.

The Religion Clauses were included in the Bill of Rights:

> [N]ot as protection *from* religion, but rather as a protection *for* religion. They were inserted in our Constitution largely because its framers felt that they were important to ensure the continuance and the strengthening of religion which could not flourish under American conditions if any State Church were either provided for or tolerated.

1 A. Stokes, CHURCH AND STATE IN THE UNITED STATES, 556 (1950). While one of the signal purposes of the Religion Clauses is to protect personal religious liberty, it is equally plain that one of the political purposes of the Clauses was to preserve the integrity of religious and governmental institutions. *See Abington Township*, 374 U.S. at 222 (government neutrality toward religion prevents powerful sects from fusing governmental and religious functions, and protects the freedom of religious observance from state compulsion); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (the federal government structure protects public and religious organizations from interfering with each other).

In her concurrence in *Lynch v. Donnelly*, Justice O'Connor's analysis of the Establishment Clause identified two evils that could

accompany the excessive involvement of religion in government and government in religion: (1) the loss of political and institutional autonomy; and (2) the loss of personal religious liberty. 465 U.S. at 687-88. The loss of institutional autonomy was not feared just for the consequences for personal religious liberty, but "equally feared because of its tendencies to political tyranny and subversion of civil authority." *McGowan v. Maryland*, 366 U.S. 420, 430 (1961). It is important, therefore, as one considers the interests served by church and state each to be independent and autonomous, that together they share important responsibilities with deep roots in our national tradition.

Both components of the Religion Clauses, then, were meant to work to the same end. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). If the Establishment Clause is read to reach results which cannot be justified in terms of religious liberty, it fails to serve the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities conducted by religious institutions which serve the public interest and which pose no actual threat to religious freedom. *Lemon*, and of necessity *Aguilar*, fail this test. They demand a scrutiny of a public program without regard to its real purposes and effects, unguided by constitutional tradition and unrestrained by any consideration of the common good.

A. A New Interpretational Guide Should Be Rooted in the History of the Religion Clauses and Capable of Consistent Application.

The Religion Clauses of the first amendment to the United States Constitution must be read consistently with the goals outlined above, as well as coherently in an internal sense. This is because, as Justice Goldburg put it in *Abington Township*, the two Religion Clauses "are to be read together, and in light of the single end which they are designed to serve. The basic purpose. . . is to promote and assure the fullest possible scope of religious liberty and tolerance for all. . . ." *Abington Township*, 374 U.S. at 305 (concurring). In order to do this, the Religion Clauses must be read with a view toward the goals that the first amendment was intended to achieve. By use of

this framework, first amendment jurisprudence can develop free from the spurious linguistic categories of "original" versus "contemporary" construction, as well as placing the Court's prior First Amendment cases in a useful context that reads the Free Exercise Clause and the Establishment Clause together.[16]

In *Lemon*, this Court attempted that goal by reading together the various strands of its jurisprudence. *Lemon*, 403 U.S. at 611-623. However, the test chosen was not adequate for it lacked roots in constitutional, as opposed to jurisprudential, precedent and, as indicated above, weighted the scales of justice against cooperation in the public interest. This Court has often said that the Constitution forbids "sponsorship, financial support, and the active involvement of the sovereign in religious activity," *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970), but has not been able to provide a means for drawing these fine distinctions. Dissatisfied with *Lemon*, members of this Court have struggled with whether *Lemon*, or a different test or tests, shall apply.[17] The result has been a lack of coherence in

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[16] Mark E. Chopko, *Intentional Values and the Public Interest - A Plea for Consistency in Church/State Relations*, 39 DePaul L. Rev. 1143, 1163 (1990). In this way, the approach attempts to link this Court's insistence that history be its guide with the reality that contemporary society, incorporation under the Fourteenth Amendment, and new problems require flexibility. Rigid and narrow use of text and history limits the usefulness of a test that is blind towards these realities. Ignorance of history means that a test lacks roots in the very text it purports to interpret. "Intentional values" is a way to bridge these two concerns.

[17] Compare *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141, 2148 & n.7 (1993), *with Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462, 2464-69 (1993) (resolution of claim in *Lamb's Chapel* relies on *Lemon*; seven days later, *Zobrest* decided without it). *See also Lynch v. Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring) (endorsement test); *County of Allegheny v. ACLU*, 492 U.S. at 655, 660-61 (Kennedy, J.) (coercion test); *Capital Square v. Pinette*, 115 S.Ct. 2440, 2452 (1995) (O'Connor, J., concurring) (different

process even while there has been a substantial shift favoring programs that are neutral towards religion.

In *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993), this Court found that a public school district's payment for a sign language interpreter for a hearing-impaired parochial school student, on the parochial school's premises, did not violate the Establishment Clause. The Court held that the interpreter could be provided on premises because that "is part of a general government program that distributes benefits neutrally" to those who qualify, even if the religious school involved may tangentially benefit." *Id.* at 2467. Three years later, in *Rosenberger v. Rector of the University of Virginia*, 115 S.Ct. 2510, 2521 (1996), the Court pointed to what it termed a "central lesson" of its Establishment Clause decisions, "that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." That principle of neutrality, the Court said, would be served, rather than undermined, by taxpayer funding of a student religious newspaper, where funding was provided to the student religious organization on the same basis as it was to other student groups. *Id.* at 2521.

This vital principle of neutrality is in no way reflected in *Aguilar*. The program overturned in *Aguilar* provided benefits to school children without reference to religion. *Zobrest*, 113 S.Ct. at 2467-9. It did so following "neutral criteria and even-handed policies." *Rosenberger*, 115 S.Ct. at 2521. The 1985 *Aguilar* decision then, is an example, *not* of the Court enforcing a requirement of neutrality, but rather imposing a "quarantine[] from public benefits" which it rejected in *Roemer*, 426 U.S. at 746. An increased focus on genuine religious-neutrality has shifted the law back toward the authentic intentions of the First Amendment. A reliable test would not need to rely exclusively on facial neutrality but could be applied in more diverse contexts. The "neutrality" approach is but one piece of a more complex puzzle. "Neutrality" tests the level of involvement between religion and government, but the set of facts and circumstances to be evaluated in the range of cases presented is

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tests for various purposes).

far broader, and requires, in our view, a different analytical tool.

As a concomitant to the obligation of government not to interfere with the institutional operation of religion, and the obligation to ensure personal religious freedom, government also bears an affirmative obligation to accommodate religion and religious practice. This is true, first and foremost, because the Free Exercise Clause affirmatively commits the *government itself* to religious tolerance. *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S.Ct. 2217, 2234 (1993). This translates into a requirement of "benevolent neutrality," *Walz*, 397 U.S. at 669 (emphasis added), not a requirement to ignore religious needs, *Roemer*, 426 U.S. at 736; *Hunt v. McNair*, 413 U.S. 734 (1973). In *Kiryas Joel*, Justice Souter noted that "government may (and sometime must) accommodate religious practices and . . . may do so without violating the Establishment Clause." *Kiryas Joel*, 114 S.Ct. at 2492, quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987). The Establishment Clause simply does not require the automatic invalidation of every cooperative effort between religious and governmental entities. *Abington Township*, 374 U.S. at 294-96 (Brennan, J., concurring).

This is consistent with Congress' decision to enact the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and with the rationales of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). These manifest an underlying recognition of an obligation on the part of our government to accommodate its own practices and requirements to the religious needs of citizens. This is because accommodation of government to religious interests is important to a free society. *Zorach*, 343 U.S. at 313-14; *see Walz*, 397 U.S. at 689 (Brennan, J., concurring). Any Religion Clauses test that does not respect the need for governmental accommodation of religious beliefs and practices flies in the face of the Framers' intent, as well as the exigencies of a complex contemporary society.

B. This Court Should Insist That Cooperative Efforts Between Religious and Governmental Institutions Be Tested According to Whether It Can be Demonstrated That the Program Actually Impairs Personal Religious Liberty or Institutional Autonomy.

A new approach to the interpretation of the Establishment Clause must evaluate two intentional goals. First, personal religious liberty must be affirmatively protected and furthered by the state. So, the state cannot sponsor one particular religious activity, or support one to the detriment of others, or oppose any or all. Secondly and simultaneously, the institutional autonomy of both governmental and religious institutions must be protected. The burden to demonstrate whether these goals have been impaired rests on the one challenging the constitutionality of the program. These values underlie the concerns expressed both in the generative debates and conditions that led to the First Amendment, and the opinions of this Court struggling to apply those provisions.

The right to engage freely in religious activity and conduct is so important that any law "restrictive of religious practice, in this society, must advance interests of the highest order." *Church of Lukumi*, 113 S.Ct. at 2237 (internal quotation marks omitted) (quoting *Yoder*, 406 U.S. at 215). A state instrumentality cannot "require[] religious exercise," *Lee v. Weisman*, 505 U.S. 577, 594, 604 (1992). It also may not actually engage in it. *Abington Township*, 374 U.S. at 305 (Goldberg, J., concurring). Public schools are prohibited from "conveying or attempting to convey a message that religion or any particular religious belief is *favored* or *preferred*." *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. at 593 (emphasis in original). These all reflect different facets of the same idea - that personal religious freedom must be protected. They must be protected against the state's imposition of religion, coercion to participate in religious activities, state action to prefer or favor a religion, or, on the other hand, state action that would tend to impede or damage the exercise of religious beliefs, even when the state also has legitimate interests to be protected. *See, e.g., Yoder*, 406 U.S. at 214; *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Personal religious freedom is not merely something tolerated because the government has no interest in it. To the contrary, this Court has held that the "Free Exercise Clause *commits government itself* to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from *animosity* to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Church of Lukumi*, 113 S.Ct. at 2234 (emphasis added). After all, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen v. Roy*, 476 U.S. 693, 703 (1986). Our Constitution itself affirmatively commits government to permit and protect religious practice and religious tolerance, and provides a high degree of protection for those practices.

At the same time, another of the purposes of the First Amendment was to protect the institutional autonomy of both civil and religious institutions. *See, e.g., Abington Township*, 374 U.S. at 222 (government neutrality toward religion prevents powerful sects from bringing about a fusion of governmental and religious functions, and also guarantees religious observance free of any compulsion from the state). In *Everson v. Board of Education*, 330 U.S. at 15, the Court quoted with approval a statement about the "interrelation of these complementary clauses" from the Court of Appeal of South Carolina rendered in 1843: "[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority." *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (1843).

In *Lynch v. Donnelly*, Justice O'Connor identified the loss of political and institutional autonomy and the loss of personal religious liberty as the consequences of a regime where religion and government did not maintain their rightful roles and relations. 465 U.S. at 687-88. The loss of institutional autonomy was not feared by the Framers simply because of its consequences for personal religious liberty, but was "equally feared because of its tendencies to political tyranny and subversion of civil authority." *McGowan*, 366 U.S. at 430. For this reason, it has long been held that one of the principal

objectives of the Religion Clauses is to prevent, as far as possible, the intrusion of both religious and political institutions into each other's essential functions.[18]

This basic proposition operates in both conceptual directions. First, religion may not intrude into or take over the proper functions of government. *Kiryas Joel*, 114 S.Ct. at 2484 (state statute is "tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires government impartiality toward religion . . .[and so] . . . violates the prohibition against establishment"); *Larkin v. Grendel's Den. Inc.*, 459 U.S. 116 (1982) (state statute gave religious groups a veto power over liquor license applications). By the same token, government and its agents cannot intrude into matters of religious belief, worship or governance. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, *supra*, (1987) (application of religious exemption to Title VII's prohibition against religious discrimination in employment to employment decisions of religious organization, does not violate the Establishment Clause); *NLRB v. Catholic Bishop of Chicago*, *supra*, (schools operated by church were not within the jurisdiction granted to NLRB by National Labor Relations Act); *Walz v. Tax Commission*, *supra*, (upholding tax exemptions for real property held by religious organizations for worship purposes). If neither form of intrusion by one institution into the other's proper area of operation or decision-making exists, or only a theoretical possibility of such an intrusion exists, then the Establishment Clause may not be violated. *Zobrest v. Catalina Foothills School District*, *supra*.

The interrelationship of both of these facets, personal religious freedom and protection of institutional autonomy, and the need to make sure that both of these interests are simultaneously balanced and protected, is a recurring theme in the Court's Religion Clauses cases. *See, Wisconsin v. Yoder*, *supra*; *Abington Township*

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[18] This condition, we submit, is a joining of free exercise and establishment clause concerns that cannot be remedied simply by jettisoning "excessive entanglement." *Supra*, note 6.

v. Schempp, supra; *Everson v. Board of Education, supra*. These themes are rooted in the history of the constitutional text and are applicable, as framed here, to a diverse array of problems. *Lemon* pays lip service to these concerns but its tripartite test of purpose, effect and entanglement has not proved capable of making the fine distinctions that complex constitutional litigation requires.

It is equally clear, however, that tinkering with the *Lemon* test itself will not solve the jurisprudential problem unless the Court also makes clear that the burden of proof must remain on the challenger of government aid programs, to demonstrate that the Establishment Clause has been violated. *See Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871). In *Aguilar*, the Court viewed the burden as being on the schools and school board involved, to demonstrate that *no* publicly employed teacher could possibly *ever* convey a religious message in the course of providing Title I services. Indeed, in the absence of proof that this was impossible, the Court seemed to assume that it would occur, and so found that the remedial education program at issue there violated the Establishment Clause. *Aguilar*, 473 U.S. at 413-414. Justice Powell, concurring, found an Establishment Clause violation inherent in the mere "risk of government entanglement" in the program's administration. *Id.* at 415 (Powell, J., concurring). It has been said in other cases that a "state must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion." *Meek v. Pittenger*, 421 U.S. 349, 371 (1975) (emphasis added).

The failing of this attitude toward burdens of proof was sharply demonstrated by Justice O'Connor in her *Aguilar* dissent, noting pointedly the utter lack of evidence in the record of even a single instance of any problem. *Aguilar*, 473 U.S. at 424. Justice Scalia delivered an extensive criticism of this requirement for "up-front assurances" in his opinion in *Kiryas Joel*, 114 S.Ct. at 2513, *et seq.* (concurring). Public supervision alone, particularly of other public employees, should not automatically be assumed to create an Establishment Clause violation. The question should be what the evidence *actually demonstrates*, if anything, regarding attempts to teach religion in government programs.

This is so, first, because there is no principled reason that the burdens of proof in a Religion Clauses case should vary from those in any other civil litigation context. Second, it appears that when the Court has given consideration to this burdens-of-proof question, it recognizes this very problem. For example, in *Bowen v. Kendrick*, 487 U.S. at 622, rather than concluding or assuming that the Adolescent Family Life Act ("AFLA"), 42 U.S.C. § 300z *et seq.*, had the impermissible primary effect of establishing religion, the Court remanded the matter to the trial court to make a factual record and decide whether "*particular* AFLA grants *have had*" that effect. The need for "detailed factual findings" was emphasized by Justice O'Connor in her *Bowen* concurrence. *Id.* at 623. The need to resist the sort of assumptions upon which the 1985 *Aguilar* opinion rests was also emphasized by Justices Kennedy and Scalia, concurring in *Bowen*, 487 U.S. at 624, and in Justice Scalia's concurrence in *Kiryas Joel*, 114 S.Ct. at 2513, *et seq.* Until the Court makes clear that the burdens of proof rest on the challenger of the governmental program in question, as it should, *Lemon*'s failings will continue to bedevil the development of Religion Clauses jurisprudence.

III. *Aguilar* Must be Overturned.

This Court should insist that a challenger must demonstrate whether a *substantial* threat (either to personal religious freedom, or of interference by one institution with another) is presented in the case. If that threat were demonstrated to be both real and serious, then a violation of the Religion Clauses would be shown. The concern with actual and substantial threats, based on the facts, should be uncontroversial as that standard applies in every other context. Under the circumstances presented in this particular case, the analytical process suggested here leads to the conclusion that a public remedial program may constitutionally be provided in religious schools as was done before the 1985 *Aguilar* decision. That program does not demonstrably threaten religious freedom and institutional autonomy.

The Court should re-examine the record. There is still no

evidence of harm.[19] On the other hand, the social and financial costs and losses attendant upon *Aguilar*, outlined above, were set forth at the time in Justice Rehnquist's, O'Connor's and Burger's dissents in that case, *Aguilar*, 473 U.S. at 419-431. They need not be repeated here. Suffice it to say that the application of any arbitrary test that sacrifices "the long-range interests of the country," in Justice White's words, is profoundly unwise and should not be deemed required by our First Amendment. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 820 (1973) (White, J., dissenting). Application of these concepts to the present case provides an inescapable affirmative answer to the question whether *Aguilar* should be overturned.

First, the provision of on-premises special education to students at all parochial schools, taught by the *same* teachers, with the same material, to reach the same goals, as used in public schools, is genuinely neutral as regards religion. No religious practice or concept is furthered thereby. As Justice O'Connor trenchantly observed in her opinion in *Kiryas Joel*, 114 S.Ct. at 2498 (emphasis in original):

> The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. All handicapped children are entitled by law to government-funded special education. . . . If the government

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[19] "[A]bstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York City." *Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting). In the same case Chief Justice Rehnquist criticized reliance on "gossamer abstractions" to overturn a useful, neutral program. *Id.* at 421. Such real threats are not to be found in cases of "attenuated financial benefit," or where violations of the Establishment Clause are found by exalting "form over substance," as the Court said in *Zobrest*, 113 S.Ct. at 2469. Where no real and substantial threat is demonstrated, no Religion Clauses violation is shown.

> provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well.

Second, because religion-neutral material is being taught, there simply *is* no real threat that either religious institutions or governmental institutions could intrude into the proper areas of activity of the other. Indeed, the fact that publicly-employed supervisors would be supervising the activities of publicly-employed special education teachers, on premises, demonstrates the independence of these two individual spheres. Clearly, on-premises special education presents no conceivable governmental threat to personal religious freedom. After 19 years of on-premises services, the lack of a single actual instance of any violation of Establishment Clause principles, as was recognized even in concurring opinions, *Aguilar*, 473 U.S. at 415, 421-31 (Powell, J., concurring; O'Connor, J., dissenting), shows that the risk in this case is chimerical at best.

Finally, the obligation of government to accommodate religious beliefs and practices should also weigh heavily in favor of overturning *Aguilar*. As noted above, this Court has repeatedly recognized this affirmative obligation. Since at least the 1920s, this Court has recognized that the right of parents to direct the education of their children is constitutionally protected. *Meyer v. Nebraska*, 262 U.S. 90 (1923); *Pierce v. Society of Sisters*, *supra*. And it is "'the best of our traditions' to 'accommodate[] the public service to the[] spiritual needs [of our people].'" *Zorach*, 343 U.S. at 314. As this Court has noted, protection of religious freedom predates "general acknowledgement of the need for universal formal education . . . . The values underlying [the Religion Clauses] have been zealously protected, sometimes at the expense of other interests of admittedly high social importance." *Yoder*, 406 U.S. at 214. It follows that even if the provision of on-premises special education in New York parochial schools could be viewed to benefit those children, Catholic, Jewish, Protestant and others alike, by permitting them to be helped in their own schools as public school students now are, that accommodation is entirely reasonable. In fact, it is required if the

parental rights noted above are to be respected in a neutral fashion, without impinging upon their childrens' rights to the services provided by Title I.

CONCLUSION

As Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) noted in *Kiryas Joel*, the 1985 opinion in *Aguilar* was in fact affirmatively "hostile to our national tradition of accommodation . . . [and] should be overruled at the earliest opportunity." *Kiryas Joel*, 114 S.Ct. at 2515. This is precisely that opportunity. *Aguilar* must be overturned in a way which genuinely reforms this Court's analytical methods.

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Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,

Petitioners,

—v.—

BETTY-LOUISE FELTON, *et al.*,

Respondents.

—and—

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

—v.—

BETTY-LOUISE FELTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE AMERICAN FEDERATION OF TEACHERS, AMERICAN JEWISH COMMITTEE; ANTI-DEFAMATION LEAGUE, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, CENTRAL CONFERENCE OF AMERICAN RABBIS, NATIONAL EDUCATION ASSOCIATION, NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, PEOPLE FOR THE AMERICAN WAY AND THE UNION OF AMERICAN HEBREW CONGREGATIONS IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE *AMICI*

Amici (described individually in Appendix A) support the constitutional principle of separation between church and state. They also believe that the federal government should help provide special services for disadvantaged children. Because the question in this case is how the two commitments can be accommodated, *amici* have a significant interest in its outcome. *Amici* believe further that the reconsideration of *Aguilar v. Felton* provides an opportunity to reinforce the constitutional structure developed by the precedents of this Court that have served to separate church and state.

SUMMARY OF ARGUMENT

1. The Court should not permit Rule 60(b) to be used by a losing party to obtain reconsideration of the very issue litigated previously. To do so would be to encourage the further politicization of this Court and constitutional law.

2. To the extent that Petitioners simply seek to operate Title I programs on the premises of the parochial schools, the relief they seek can be granted without either eliminating the undue entanglement test or otherwise revising any core doctrine of the Establishment Clause.

(a) The undue entanglement branch of the Establishment Clause has not been limited to the financial aid context in which it was first applied. Instead, this branch of the test has been applied across the range of Establishment Clause cases that have been decided by this Court. The doctrine has sustained judgments on subjects as diverse as religious speech, state taxation of churches, and the exemption of churches from anti-discrimination and other regulatory statutes.

(b) The undue entanglement doctrine remains a living part of the law. None of the reasons that would justify a departure from the principle of *stare decisis* would sustain a repudiation of the doctrine.

(c) Although the undue entanglement test has been criticized as creating a "Catch-22", that criticism is misplaced. First, the criticism assumes that direct aid to religious institutions requires no special precautions, an assumption we believe fundamentally flawed. In any event, entanglement should serve as a threshold bar only where the circumstances make it likely that religion will inject itself in unpredictable, subtle ways, such that a comprehensive, discriminatory, and continuing state surveillance is required to ensure compliance with the principle that government may not fund religion.

(d) While *amici* believe that the entanglement test is properly part of the Establishment Clause, they believe that New York City could operate a Title I program on parochial school premises without creating undue entanglement, provided that appropriate safeguards are ordered into effect by the trial court. Those points (listed on page 19 of this Brief) would ensure that the Title I program would be wholly public in its operation. The public school authorities should be required to develop an appropriate, non-intrusive, mechanism for ensuring compliance with the safeguards, including a procedure for processing complaints. Where such compliance can be achieved by non-intrusive, easily applied objective rules, the undue entanglement test is neither necessary nor appropriate..

3. (a) The Chancellor and some his *amici* urge this Court to discard the long-settled rule that the Establishment Clause bars

financial aid to religious institutions. In its stead, they would substitute a rule of equal funding of religious and secular institutions. This case, which has no properly developed record, is not the occasion for such a reexamination.

(b) In any event, while it is true that the Court has acknowledged that equality between religion and non-religion is an element of the Establishment Clause, it has refused to allow that principle to override the core bar against financial aid to religious schools. The no-aid rule finds support in this Court's earliest Establishment Clause cases and through all of its parochial school aid cases. (Some of the Chancellor's *amici* acknowledge this, and ask that those cases be overruled in favor of the equal treatment cases.) The no-aid rule limited the holdings in all of the cases the Petitioners cite, including: *Witters v. Washington*; *Zobrest v. Catalina Foothills* and *Mueller v. Allen*.

Most importantly, in *Bowen v. Kendrick*, in which this Court relied on the equal funding argument, and upheld the facial constitutionality of a statute permitting religious and secular agencies to run chastity programs, it pointedly refused to permit pervasively sectarian institutions to provide such programs or to permit non-pervasively sectarian agencies to use federal funds to teach religion.

(c) History demonstrates that the no-aid principle has always been understood to be part of the Clause. The Founders clearly contemplated a no-aid rule. Throughout the nineteenth century lawyers and others emphasized that the no-aid rule was an essential part of American church-state relations.

ARGUMENT

The narrow question before the Court, originally in 1985, and now again, is not whether, but under what circumstances, Title I services should be provided to parochial school students. The broader issue raised by some Petitioners and their supporting *amici* is whether this Court should revise wholesale its precedents governing aid to parochial schools. The first question is difficult. The second is not. Regardless of how the first question is answered, the answer to the latter question is an emphatic "no."

I. Rule 60(b) Is Not An Appropriate Vehicle To Readjudicate Constitutional Issues Decided In *Aguilar*

F.R.Civ.P. Rule 60(b) has never been invoked by a losing party to have a constitutional issue readjudicated by this Court. The arguments against doing so here are set out in the Briefs of the Respondents and the Committee on the Supreme Court of the New York County Lawyers Association. We adopt their arguments, adding only a few observations.

Aguilar was decided by a 5-4 vote. Such decisions constitute a tenth of last Term's decisions, 110 HARV.L.REV. 370 (1996), and are particularly common in cases which excite the greatest public controversy. Last Term, for example, the racial redistricting case, *Shaw v. Hunt*, 116 S.Ct. 1894; the punitive damages case, *BMW of North America v. Gere*, 116 S.Ct. 1589; and the Eleventh Amendment case, *Seminole Tribe v. Florida*, 116 S.Ct. 1114, were all decided by a 5-4 vote.

Seminal constitutional issues often place this Court at the center of sharp political controversy. Despite the intensity of disagreement, however, losing parties respect the process and

rely on subsequent litigation to narrow or modify decisions with which they may disagree. Even though this Court's members may change, the normal processes of constitutional adjudication do not permit a disappointed party, buoyed merely by a change in the Court's composition, to pursue a shortcut to a reversal.

To grant the 60(b) motion in this case will foster the hope that such reversals can be achieved, aggravating the political tensions that too often surround the work of this Court. The issues Petitioners raise are easily reviewable in other cases—for example, in a lawsuit brought by another school district affected by *Aguilar*, or by the parties to a case such as *Helms v. Cody*, 1997 W.L. 35283 (E.D. La. 1997), in which the decision turns on the conclusion that *Aguilar* is no longer good law. While the constitutional issues in this case may loom large in the eyes of dissatisfied parties, the resulting erosion of the authority of this Court, and the leapfrogging over the normal processes of adjudication, are institutional costs that far outweigh the assumed importance of the issues in this case.

II. If The Court Reaches The Merits, It Should Not Revise The Undue Entanglement Principle, Or Any Other Aspect Of The Core Establishment Clause Jurisprudence

A. The Undue Entanglement Principle is Well Ensconced in the Case Law

The Agostini Petitioners direct their primary attack on the third prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971)—that of undue entanglement between government and religion. The Chancellor and other officials of the New York City Board of Education ("Chancellor") join that attack, but more broadly challenge certain barriers the Court has found in the

Establishment Clause against the transfer of financial responsibility for the operation of religious education from the church to the public fisc. The Chancellor and his *amici* seek to substitute for the long-standing interpretation of the Establishment Clause barring financial aid to religion a rule permitting the state to fund religious and secular causes equally. Either eliminating the entanglement prong or adopting an equality principle would erode the intended meaning of the Establishment Clause, and either course would cut a far broader swath through the law than is necessary to resolve this case.

We demonstrate below why any weakening of the undue entanglement principle would in significant measure erode the intended meaning of the Establishment Clause (Point II. A.1.), and why there is no need to revise that principle in order to resolve this case (Point II.A.2). Although undue entanglement is the only question that the Court need address in order to resolve this case, we respond in Point III to the Chancellor's argument in support of a rule which would allow equal funding of both secular and religious causes, and demonstrate why this argument converts a case about the margins of the Establishment Clause to one about the Clause's very essence (Point III.A), and why the proposed rule is contrary to the history and purposes of the Establishment Clause (Point III.B).

1. A Ban on Undue Entanglement is an Indispensable Element of the Establishment Clause; New York City's Proposed Title I Program can be Implemented Without Undue Entanglement

Aguilar rests on the third prong of *Lemon v. Kurtzman*, that a government program may not constitutionally create "undue

entanglement between the organs and officials of the state and the organs and officials of the church." *Aguilar*, 472 U.S. at 408-15; *id.* at 415-17 (Powell, J., concurring); *id.* at 420-21 (Rehnquist, J., dissenting); *id.* at 426 (O'Connor, J. dissenting) ("The Court today relies entirely on the entanglement prong").

Petitioners' direct attack on undue entanglement does not challenge a novel principle created for *Aguilar* alone, the elimination of which would affect that case only. Undue entanglement has been an integral and significant part of this Court's jurisprudence both before *Aguilar* and after, and outside the aid-to-parochial-school context in which it first arose. It developed both in cases rejecting entanglement allegations, as well as in cases sustaining them. These cases demonstrate how deeply rooted is the Court's concern with undue entanglement.

In the speech context, cases allowing religious speech in public facilities have rested in part on the fact that a religion-neutral rule avoids undue entanglement, and is therefore constitutionally sounder than a competing rule distinguishing between religious and secular speech. *Widmar v. Vincent*, 454 U.S. 263 (1981). *Widmar* began a line of cases which support the proposition that, assuming no real or perceived official sponsorship, religious speech in a public forum should be treated no differently from non-religious speech. *Capital Square Advisory & Review Bd. v. Pinette*, 115 S.Ct. 2440 (1995); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S.Ct. 2510 (1995); *Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. 384 (1993).

In *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), this Court refused to referee a struggle for control

of a church. It noted that by refereeing such contests "the state will become *entangled* in essentially religious controversies." *Id.* at 709 (emphasis added). *See also, Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

The same concern led this Court to reject a church veto over the granting of liquor licenses to nearby premises. Any effort by the state to ensure that the veto was not used to further religious agendas would have required undue entanglement. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

An Establishment Clause challenge to the exemption of religious corporations from Title VII's ban on religious discrimination was rejected on entanglement grounds in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). A building services employee of a Mormon community center challenged the exemption's breadth, arguing that a narrow exemption for positions with a religious component would have satisfied the legitimate governmental interest in avoiding undue entanglement at less cost to non-Mormon employees.

This Court unanimously rejected that claim. Accepting it would have entangled the government in policing the elusive boundary between jobs with substantial religious content and those without. 483 U.S. at 339; *id.* at 344 (Brennan, J., concurring). ("A case-by-case analysis ... would both produce excessive government entanglement with religion and create the danger of chilling religious activity.")

Hernandez v. Commissioner, 490 U.S. 680, 693 (1989), rejected the claim that denying charitable deductions for contributions for which there was a *quid pro quo* created undue entanglement by requiring an evaluation of the economic value

of religious services. This Court reasoned that a uniform rule against deductions for which there was a *quid pro quo* created less entanglement than would a rule distinguishing between religious and secular ones.

Upon similar reasoning, this Court rejected a challenge to the application of the Fair Labor Standards Act ("FLSA") to church-run businesses in *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985), concluding that applying FLSA to those enterprises was less entangling than discriminating between religious and secular ones. *Accord*, *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378, 392-96 (1990) (universal applicability of sales tax less entangling than exemption of religious items).

The undue entanglement branch, like the others in the tripartite test, was not created *ex nihilo* in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Rather, *Lemon* merely restated the "cumulative criteria developed by the Court over many years." *Id.* at 621. As authority for the undue entanglement inquiry, Chief Justice Burger in *Lemon* cited *Walz v. Tax Comm'n*, 397 U.S. 664, 674-75 (1970), warning against excessive government entanglement with religion in regard to financial aid programs: "Obviously a direct money subsidy would be a relationship pregnant with involvement and ... encompass sustained and detailed administrative relationships ...."

Justice Harlan, while recognizing that the "core" values of the Establishment Clause were bans on official support for religion and official coercion to participate in religious activities, noted that these values "may not suffice by themselves to

achieve in all cases the purposes of the First Amendment." *Walz*, 397 U.S. at 695. Hence, he wrote:

> Although the very fact of neutrality may limit the intensity of involvement, government participation in certain programs, whose very nature is apt to entangle the state in the details of administration and planning

can violate the Establishment Clause. *Id.* (Harlan, J., concurring).

Petitioners' call for the Court to discard the undue entanglement inquiry—a call the Secretary of Education pointedly refuses to join—would more than merely adjust the literary formulation of a test or lower the barriers to aid to parochial schools. Adoption of their position would reverberate across the entire range of Establishment Clause cases.

Even assuming that there are special reasons for reconsidering the specific application of the entanglement test to New York City's Title I program, none counsel reconsideration of the test itself. *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992); *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring) citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984): "No evolution of legal principle has left the [entanglement branch's] doctrinal footings weaker than they were ...." *Casey*, *supra*, 505 U.S. at 857. As the cases discussed show, undue entanglement remains a living part of the law, not a remnant of abandoned doctrine. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). This Court should not now discard it.

2. A Ban on Undue Entanglement Comports With the History and Purposes of the Establishment Clause

The undue entanglement test is well grounded in the purposes and history of the Establishment Clause, as well as the history of established churches in their relationships with their patrons. States with an established church arrogate to themselves decisions for and about the church: who shall hold church office; what church doctrine shall be; what liturgy the church shall use; and about which public issues the church may speak. These features figured prominently in the church-state battles of post-reformation England of which the Founders were well aware and intent on preventing. *Larkin, supra*.

To this day, these are acutely divisive problems where any form of established church persists (ordaining women in England; who is a rabbi in Israel). The debates are contentious, and almost impossible to resolve through democratic processes.

By disestablishing the church, the First Amendment went far towards preventing state interference with the internal affairs of the church, and concomitantly preventing the church from dominating the state. Avoiding entanglement does not merely protect the liberties of the churches, as Petitioners and their *amici* contend. It ensures the rights of all citizens.

Those broad goals can be eroded piecemeal as well as wholesale. Tolerating "undue entanglement" of state and church will signal a significant erosion of disestablishment. A ban on arrangements in which undue entanglement is unavoidable is a necessary and desirable bulwark against the political and religious evils that the Clause was designed to forestall.

3. Criticism of Undue Entanglement Rests on a Misconception of its Scope

As we have observed, *Aguilar* rested on no new legal principle nor one contrived for that case. Nevertheless, the threshold ban on programs creating undue entanglement has been criticized by some members of this Court for creating a "Catch-22." If the government fails to police religious organizations, it is said, government funds may be used impermissibly to fund religious activity. If it does police them, it runs afoul of the ban on undue entanglement. *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 109-11 (1985) (Rehnquist, J., dissenting); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 769-70 (1976) (White, J., dissenting). An unstated assumption of this argument is that funding of religious institutions poses no special constitutional difficulties and requires no special safeguards. With all deference, we submit that this assumption is fundamentally flawed. Point III *infra*.

The "Catch-22" exists only if the undue entanglement test is caricatured and expanded beyond its proper scope. Entanglement should serve as a threshold bar only where the circumstances make it likely that religion will inject itself in unpredictable and subtle ways, such that "a comprehensive, discriminatory, and continuing state surveillance," *Lemon*, 403 U.S. at 619, is required to ensure compliance with the principle that government may not fund religion. *Bowen v. Kendrick*, 487 U.S. 589, 616-17 (1988); *Tilton v. Richardson*, 403 U.S. 672, 682 (1971).

What is forbidden by the undue entanglement inquiry is not policing that is external, mechanical, routine and predictable, but

policing that is intrusive, formless, varying and unpredictable, and that requires religious and secular institutions to interact continually over subtle and hazy border questions. "Entanglement is a question of kind and degree." *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984). "There is no exact science in gauging the entanglement of church and state." *Roemer*, *supra*, at 766. *See also*, *Hunt v. McNair*, 413 U.S. 734, 736 (1973); *Rosenberger*, *supra*, 115 S.Ct. at 2525-26 (O'Connor, J., concurring). The question is necessarily one of judgment, not precise mathematical calculation.

The cases considering undue entanglement claims are fully consistent with this emphasis on practical judgment. Where the state subsidizes tests created by religious schools undue entanglement exists, because intrusive and continuous review of the tests would be required to ensure against public funding of religion. No such supervision is required where the state pays the schools for administering the state's own exams. *Compare Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1977) *with Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 660 (1980). The point is not that state-created tests cannot be used improperly, but that the likelihood is so low, and so easily and mechanically detected, that undue entanglement does not bar the program at the threshold.

Similarly, while the impressionability of young students and the more intense religious indoctrination present in elementary and secondary parochial schools require close supervision of aid to such schools, the very different characteristics of colleges and universities do not. *Roemer*, *supra*, 426 U.S. at 762-65; *Hunt*,

supra. Teenage pregnancy prevention services do not create undue entanglement in non-pervasively religious institutions, but do in pervasively sectarian ones. *Bowen*, *supra*, 487 U.S. at 615-18.

Aid to parochial schools not readily used for religious instruction, such as textbooks approved for public school use, *Board of Educ. v. Allen*, 392 U.S. 236 (1968), does not create undue entanglement, but does if the aid can readily be employed for religious instruction, such as teacher salaries or "community education" programs. *Grand Rapids City Sch. Dist. v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Bus transportation for school trips, which can either be to a science museum or a religious shrine, and which, if the ban on funding religious institutions is to remain meaningful, require close and ongoing discretionary review of decisionmaking with hazy boundaries, creates undue entanglement. *Wolman*, *supra*, 433 U.S. at 254-55 citing *Roemer*, *supra*, 426 U.S. at 749. A real estate exemption for church property used for charitable but not religious purposes would be entangling, but an exemption for all church property is not. *Walz*, *supra*. Similarly, there is no entanglement when sales taxes are assessed against churches. *Jimmy Swaggert Ministries*, *supra*; *Tony and Susan Alamo Found.*, *supra*.

That the Court has not had occasion recently to invalidate a program on these grounds—as it did in *Larkin*, *supra*; *Wolman*, *supra*; *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Lemon*, *supra*—demonstrates only that the Court's lessons on the dangers of excessive entanglement have been taken to heart.

Excision of the test from the law would reverberate unpredictably, and far beyond the narrow confines of this case.

In sum, the "Catch-22" argument rests on the fallacy that government aid to religious institutions gives rise to no special concerns; and an exaggeration of the scope of the undue entanglement doctrine. Properly understood and limited, the undue entanglement inquiry should remain part of Establishment Clause jurisprudence.

B. If this Court Grants the Motion, It Should Direct Imposition of Easily Policed Safeguards to Ensure Compliance with the Constitution

It is understandable that in deciding *Aguilar* this Court thought that New York's Title I program created the need for policing a border of uncertain location. The program involved instruction; it required interaction of no fixed content between public and private school instructors, and it took place on the premises of the religious schools.

Moreover, *Aguilar* was decided in tandem with *Ball*, *supra*, involving a program that, in addition to other defects, cried out for strict policing of the sort condemned by the undue entanglement principle. Teachers in the program at issue in *Ball* taught a variety of courses, including some with possible religious content. The courses included those all schools must or commonly do offer, including enrichment courses, math, reading, art, language, yearbook, Christmas arts and crafts, humanities, and school newspaper. Some of the teachers were recruited from the parochial schools and taught in two different capacities in the same school, sometimes as public, sometimes as religious, school teachers.

Understandably this Court decided that the arrangements at issue in *Aguilar* and, *a fortiori*, in *Ball*, were pregnant with the possibility of undue entanglement. (In *Ball*, of course, the constitutional difficulties were not limited to problems of undue entanglement). It is now apparent, however, that the risk of a Title I remedial program becoming a vehicle for promoting religious education can be minimized by clear, easily policed rules. In *Ball*, those risks could be avoided only by the government's "undue entanglement" with the religious school. Because *Aguilar* and *Ball* involved different programs, they require different applications of the entanglement principle.

In reaction to this Court's *Aguilar* decision, indeed, at its invitation, 472 US. at 414; *id.* at 430-31 (O'Connor, J., dissenting), school districts moved their Title I programs out of parochial schools and into self-contained classrooms, typically in vans. Courts have understood *Aguilar* to require a departure only from the school building itself, not the premises of the parochial school (*e.g.*, a parking lot). *See, e.g.*, *Walker v. S.F. U.S.D.*, 46 F.3d 1449 (9th Cir. 1995); *Barnes v. Cavazos*, 966 F.3d 1056 (6th Cir. 1992).

With the exception of actual presence in the parochial school building, the current program appears otherwise identical with the program invalidated in *Aguilar*. Although the issue has not been developed factually (as it should be on remand), there do not appear to be difficulties in ensuring that New York's Title I program remains wholly under secular control, particularly in

light of the statutory command that Title I programs supplement, not replace, existing programs. 20 U.S.C. § 6322(b).[1]

If the facts bear out this conclusion, policing the boundaries between public personnel and religious schools should be no more onerous or unduly entangling than policing the loan of textbooks to parochial schools. New York's Title I program would be far less onerous to regulate than the various wide-ranging programs at issue in *Ball*, in which the public schools bore much of the ordinary educational burden of the parochial schools and became so intertwined with their day-to-day operation as to suggest both a physical and symbolic union between the two. 473 U.S. at 389-92.

The Chancellor now proposes to take the vans and (metaphorically) move them intact into the parochial school building. Assuming that certain safeguards are in place—and *amici* believe that, taken as a whole, these safeguards are constitutionally required, *see* page 19, *infra*—undue entanglement should not be a threshold bar to the provision of Title I services in the parochial schools. Of course, constitutional violations can still occur, and the Board of Education must not be complacent about ensuring compliance.

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1. A very different case would be presented if parochial schools could, as the public schools may, use Title I funds for "entire school" programs designed to improve the school's instruction generally. The Secretary commendably does not allow parochial schools to use Title I funds this way.

But these concerns are not of such a quality, or of such frequency, as to impermissibly intertwine church and state.

Permitting on-site Title I programs would not precisely return the law to the *status quo ante*. Prior to *Aguilar*, the Department of Education had in force Title I regulations that, while not addressing all possible constitutional violations, went a long way in that direction. In light of *Aguilar*, it is understandable that the current rules, 34 C.F.R. § 200.12 and § 2001.13, are more limited, addressing chiefly the use of dedicated computers on school premises. They do not now delineate in detail what would be required to conduct a constitutional in-school program,.

New York City has represented that, if *Aguilar* were overturned, it would conduct the program in ways that would entirely insulate it from religious influences. Those representations are not embodied in any rule of the Board of Education. The Board's own performance leaves room to doubt the strength of its commitment. It has sometimes departed from principles of religious neutrality in the operation of Title I programs in the face of determined religious pressures. *Parents Ass'n v. Quinones*, 803 F.3d 1235 (2d Cir. 1986). Some guarantee of compliance is imperative.

Petitioners insist that the safeguards New York City previously had in place were sufficient to ensure compliance with the First Amendment. They point to the absence in the record of proven instances of religious influence on the Title I program when public school teachers were sent into the parochial school. The silence of this record is not, however,

proof that no such abuses occurred or that they might not occur in the absence of safeguards.

A bare bones overruling of *Aguilar* would lend full-throated approval to practices that are at best voluntary, not binding on the Secretary or the Chancellor, and that may have been wholly inadequate to the task when last in place. Assuming that it may be used in this case, Rule 60(b) provides that relief is to be granted "upon such terms as are just." In this case, those "just" terms should include sufficient mandatory safeguards to ensure that Title I programs remain wholly under public control. At a minimum they must encompass the following points:

(a) Personnel should be selected, assigned, supervised and disciplined by public authorities, on the same terms as other public school teachers. In particular, assignments to parochial schools should be made by public authorities without regard to the race, religion, sex, or political affiliation of a teacher. Parochial schools must not be allowed to control the dress of public school teachers.

(b) The curriculum should be controlled by public school authorities.

(c) Access to the program should be dependent on objective tests selected by public school authorities. Religious criteria may not be used to screen student access.

(d) Classrooms should be wholly under public school control, and be free of all religious symbols.

Compliance with these safeguards, taken together, likely would ensure that the Title I program is free of religious influences and does not give any appearance of government endorsement of religion. Rather than undertake the task itself,

this Court should remand this case to the trial court to prescribe the exact form of the required safeguards. Public and parochial school authorities should be required to agree to comply with these safeguards, and to inform all persons who participate in the Title I program of what they provide.

III. The Court Should Reject The Attempt To Make Equality Between Religious And Secular Causes The Decisive Test

It is possible to decide in favor of Petitioner without changing the law regarding aid to parochial schools, much less the general rules for deciding Establishment Clause cases. Nevertheless, the Chancellor and his *amici*, notably the Christian Legal Society ("CLS"), urge this Court to discard the long-settled no- aid-to-religion rule and replace it with a principle of equal funding of both secular and religious causes. To accept that invitation would be to convert a case about the Establishment Clause's margins to one about its very essence.

In this significant respect, while *amici* depart from the Solicitor General's views on several points, we applaud and join his proposal that any revisitation of *Aguilar* should be narrow and limited. Especially in light of the special procedural circumstances of this case, this is not the occasion for sweeping declarations on future cases. This is certainly not a case in which to reconsider *Lemon* in whole or in part. Other cases now developing in the lower federal and state courts would be affected by some of the wide-ranging pronouncements invited by Petitioners and other *amici*. Neither the parties to those cases nor the records they are making are here. This Court's settled counsels of prudence stand against affecting or deciding issues

in those cases in the course of reconsidering *Aguilar*. We write only to show how revolutionary is the course proposed by Petitioners.

A. The Establishment Clause has been Correctly Understood to Forbid Subsidies to Religious Organizations for Religious Purposes

As applied to aid to parochial schools and other religious institutions, this Court's decisions ever since *Everson v. Board of Educ.*, 330 U.S. 1 (1947), have taken for granted that the Establishment Clause imposes special restrictions on the funding of religious enterprises. *Everson* traced the history of the dispute over Virginia's attempt to levy a small tax for the support of ministers of the gospel. That history was retraced in *Lemon* and *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). *Cf. Quick Bear v. Leupp*, 210 U.S. 50 (1908) (distinguishing between Indian trust funds and tax funds for Establishment Clause purposes); *Terret v. Taylor*, 13 U.S. (9 Cranch) 43 (1815).

Most recently, in *Rosenberger*, *supra*, a majority made plain its continued adherence to the no-aid rule. Considering the constitutionality of using a student activity fee to be used to print a religiously oriented student magazine, the majority carefully distinguished a student fee from a general tax. Expressly agreeing with Justice Souter's dissent, the majority "recognized special Establishment Clause dangers where government makes direct payments to sectarian institutions." *Id.* at 2522. It warned against the "abuse" of a state "subsidizing" a church by paying its bills. *Id.* at 2524.

Justice O'Connor, having first restated the *Everson* rule, 115 S.Ct. at 2526, concluded that permitting student funds to be indirectly used for a religious periodical "neither trumpets the supremacy of the neutrality theory, nor the demise of the funding prohibition in Establishment Clause jurisprudence." *Id.* at 2526-28. The dissenting Justices, who would have held the use of a student fee to support a religious publication unconstitutional, reaffirmed the no funding principle.

The Chancellor mistakenly argues that *Zobrest v. Catalina Foothills School District.*, 509 U.S. 1 (1993), and *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), together with the equality for religious speech cases such as *Widmar*, *supra*, *Rosenberger*, *supra*, and *Pinette*, *supra*, stand broadly for the proposition that equality between religion and non-religion is the nub of the Establishment Clause.

Unlike the Chancellor, *amicus* CLS at least acknowledges that the aid to parochial school cases are in conflict with this argument. It asks that the no-aid cases be overruled. In particular, CLS argues that the no-aid rule is at odds with the Free Exercise Clause, even though that Clause has been held by this Court not to require equal subsidization of religious and public education. *Leutkemeyer v. Kaufmann*, 364 F.Supp. 376 (E.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974). *Accord*, *Nyquist*, *supra*, 413 U.S. at 788-89; *Norwood v. Harrison*, 413 U.S. 455, 462 (1973); *Roemer*, *supra*, 426 U.S. at 747.[2]

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2. Critics of the no-aid rule have sought a constitutional amendment to overturn it. *See* H.J.Res. 121, 104th Cong. 2d Sess. (1996).

Repudiating the no-aid rule would not only overrule *Leutkemeyer*, it would eviscerate the opinion in *Everson*, *supra* at 16, and holdings in cases such as *Lemon*, *supra*; *Nyquist*, *supra*; *Wolman*, *supra*; *Pittenger*, *supra*; *Levitt*, *supra* and *Ball*, *supra*, together with numerous summary affirmances and numerous decisions from the state and lower courts. The no-aid rule underlies the decisions in numerous other cases, including *Bowen*, *supra*; and *Quick Bear*, *supra*. It is surely neither necessary nor desirable for this Court to undertake such a wholesale revision of its precedents here.

B. No Case Adopts an Equal Funding Rule

Not a single one of the cases said to stand for the principle of equal funding for religious and secular causes has adopted it in the unalloyed form for which the Chancellor and *amici* contend. *Mueller v. Allen*, 463 U.S. 388 (1983), probably comes closest to such a rule—and it did not adopt it. There, this Court allowed parents of both parochial and public school students to deduct certain school expenses from state income taxes. Pointing to the statute's "neutrality", the Court upheld the deduction against Establishment Clause attack. But the Court did not rest on neutrality alone. It began by noting that review took place under the "especially broad latitude" applicable to classifications created in state tax laws, 463 U.S. at 398, a factor emphasized by later decisions. *Zobrest*, *supra*, 509 U.S. at 9; and *Ball*, 473 U.S. at 296 n. 13.

Later, the Court explained that providing aid to parents "by means of a deduction, rather than a direct grant, ... serve[d] to make the State's action less objectionable." 463 U.S. at 402 n.10. And the majority recognized that "[t]he Establishment

Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches." *Id.* at 400

Witters v. Washington, 474 U.S. 481 (1986), pointedly refused to read *Mueller* as embracing a simple equality rule. There, a blind person wished to use vocational training benefits for theological education. The state refused, citing the Establishment Clause. This Court reversed, chiefly because the fact that funds flowed to a religious institution was sheer happenstance. The program was certainly not a scheme for transferring financial responsibility for religious education to the public fisc, one of the Establishment Clause's central prohibitions. *Id.* at 488 (citing *Nyquist*, *supra*, 413 U.S. at 785).

Three concurring Justices thought that the fact of equal treatment ought to control regardless of whether the number of persons subsidized was great enough to make the program a reliable and substantial source of support for religious education. The majority disagreed. 474 U.S. at 488-89.

In *Bowen v. Kendrick*, 487 U.S. 589 (1990), equal funding again did not carry the day. There, on a equal basis, a statute funded pregnancy prevention programs operated by secular and religious providers. If equality was sufficient, the program was constitutional not only on its face, but as applied, even if funds went to pervasively sectarian institutions for religious programs.

This Court refused to go so far. It upheld the program's facial constitutionality with two important caveats: first, a non-pervasively religious recipient could not use government funds to teach religion; and second, notwithstanding equality between religious and non-religious grantees, a pervasively sectarian program could not receive funding. What the *Bowen* Court did

not do was hold that the bare fact of equality permitted direct subsidization of religious teaching.

Similarly, an equality of benefits theory was unable to preserve the constitutionality of the community education program at issue in *Ball*, *supra*. In an effort to appeal to taxpayers who sent children to parochial schools, that program was designed to equalize the publicly funded benefits available to parochial and public school students. As in *Witters* and *Mueller*, attendance at these schools was the product of independent parental decisionmaking. If simple equality of funding (or equality plus private choice) were the whole constitutional rule, this program should have been upheld *in toto*. But the well-settled constitutional rule against transferring responsibility for religious education to the public fisc prevailed.

In *Zobrest*, this Court rejected a claim that allowing a school district to pay for a sign language interpreter for a parochial school student established religion. The Court, while indeed emphasizing the fact that the services were available equally in public and parochial schools, relied heavily on that aspect of *Witters* which emphasized the attenuated nature of the financial benefit to the school and the impossibility of using the statute as a means of shifting primary responsibility for funding religious education to the state. 509 U.S. at 8.

Distinguishing, not overruling, *Ball*, the *Zobrest* Court reasoned that *Ball* involved aid that "reliev[ed religious schools] of an otherwise necessary cost of performing their educational function," *id.* at 12. And this Court noted that *Zobrest* was an easy case because "no funds ... ever find their way into sectarian school coffers," *id.* at 10.

Rosenberger, too, although it did permit a state agency to transfer funds for the benefit of a religious organization's teaching, was at great pains to emphasize that it was not upholding the use of general revenues to fund religious teaching, a practice, it observed, that would run afoul of long-settled constitutional understandings. It noted, too, that the funds did not flow to the church directly to pay for religious activities. 115 S.Ct. at 2523.

The cases are thus consistent in upholding the "cardinal principle that the state may not ... become the prime supporter of the religious school system." *Ball*, *supra*, 473 U.S. at 397. Subsidization of religious education is a "result wholly at variance with the Establishment Clause." *Nyquist*, *supra*, 413 U.S. at 782, n. 38. Equal treatment of religious and secular causes is an element of the Establishment Clause, but it cannot be allowed to trump the central principle that informs the Clause: Government may provide incidental financial aid to religious instruction, but aid which by its scope and predictability shifts the burden of funding such instruction to the public fisc is unconstitutional.

C. History Lends No Support to Equality of Funding as the Core Value of the Establishment Clause

Both advocates and opponents of the principle of equal treatment marshall arguments from the founding era in support of their position. Those arguments are summarized in the clashing opinions of Justices Thomas and Souter in *Rosenberger*, *supra*, 115 S.Ct. at 2529; 2535-39. *Amici* believe that Justice Souter has far the better of that argument.

The subsequent course of history dispels the notion that the Court's traditional understanding of the founding era is distorted by 20th century perceptions. Throughout the 19th Century the no-aid principle, often referred to as the volunteerism principle, was held out as an essential element of the American arrangement of church-state relations.[3] This is easily documented whether one looks to religious sources or legal ones.

The well-known church historian, Phillip Schaff pointed to the absence of governmental support for religious activities as a unique and salutary feature of the American church-state settlement:

> Another peculiarity in the ecclesiastical condition of North America, connected with the Protestant origin and character of the country, is the separation of church and state. ... The president and governors, the congress at Washington, and the state legislatures, have, as such, nothing to do with the church, and are by the Constitution expressly forbidden to interfere in its affairs. ... The church, indeed, everywhere enjoys the protection of the laws for its property, and the

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3. A recently published 1833 letter of James Madison explicitly affirms Madison's understanding that the separation of church and state enjoined by the First Amendment required that the "Christian religion itself, ought not, so far at least as pecuniary means are involved, to be provided for by the Government, rather than be left to the voluntary provisions of those who profess it." Letter of James Madison to Jasper Adams in D.L. Dreisbach, Religion and Politics In the Early Republic: Jaspar Adams and the Church State Debate (1996), 117-20.

> exercise of its functions; but it manages its own affairs independently, and has also to depend for its resources entirely on voluntary contributions.

Phillip Schaff, *America, A Sketch of Its Political, Social and Religious Character*: John Harvard Library Reprint, 1961 (1854) 73-75. Professor Perry Miller in his introduction to the reprint of that lecture notes that literally thousands of sermons to this effect are extant. *See id.* at xxxiii. Those sermons reflect the triumph of the Jeffersonian and Republican antipathy to state support of religion. A.M. Schlessinger, *Age of Jackson* (1945), 350-68.

Dr. Schaff repeated these views at the end of the century in a lengthy paper on American church-state relations prepared for the American Historical Society, 2 *Papers of the American Hist. Ass'n* #4 at 15, 48, 78-83 (1888). *Accord* R. Baird, *Religion In the United States of America* (1844), at p. 286-90. Or as F. Lieber put it in *Civil Liberty and Self-government* (Philadelphia, 1859) p. 99, "the American doctrine of separation prohibits government from forming or endorsing churches ... nor [tolerates] the people [to] be taxed by government to support the clergy of all churches as is the case in France." Those states that had not adopted the no-aid principle at the time of the framing of the Constitution did so in the 19th century.

The few judicial decisions in the 19th Century reflect this view. *See, e.g., Cook County v. Chicago Industrial School for Girls*, 125 Ill. 540, 118 N.E. 183, 193 (1888) (citing Cooley, *Constitutional Limitations* (5th ed. 1890) at p. 380) (referring to both state and federal constitutions). "Not only is no one religious denomination to be favored at the expense of the rest,

but all support of religious instruction must be entirely voluntary." *Id. Accord, Board of Educ. v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233 (1872) (federal and state constitutions).

Henry Black, in his *Handbook of American Constitutional Law*, § 198(c) (2nd ed. 1897), stated as black-letter law that both federal and state constitutions prohibit "the appropriation of public money ... for the support of any church, sect, or religious body ...." *Id.* at 447. And, he explained, "A church is established ... when it is supported by general or public taxation." *Id.* at 453. And, of course, it was the no-aid rule which (although tainted by anti-Catholic bigotry, with which it was too often combined), fueled the movement to prevent state governments from funding parochial schools. *See* D. Ravitch, *The Great School Wars* (1974); J.W. Pratt, *Religion, Politics and Diversity: The Church-State Theme In New York History* (1967). Congress insisted that each state (except Idaho) admitted to the union after 1875 insert a no-aid provision into its constitution. *See* II A.P. Stokes, *Church and State In The United States* (1950) at 69-70. If government did not always observe the constitutional rule—as governments are want to do—the rule itself was clear enough.

These sources lend substantial support to the reading of the founding era history of the Establishment Clause urged by Justice Souter, that the no-aid principle was an integral element of political arrangements embodied in that Clause.

CONCLUSION

For the reasons stated the judgment should be affirmed because Fed.R.Civ.P. 60(b) is not an appropriate vehicle for reconsidering *Aguilar*. Should this Court disagree, the case

should be remanded to the District Court for appropriate fact-finding and entry of a modified injunction.

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March 27, 1997

APPENDIX A

APPENDIX A

Agostini Amici

The *American Jewish Congress* is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious interests of American Jews. It has a long-standing commitment to the separation of church and state, having either represented one of the parties or filed briefs *amicus curiae* in most of this Court's cases interpreting that principle.

***

The *American Federation of Teachers, AFL-CIO* (AFT) is a national labor union affiliated with the AFL-CIO and is the parent organization of various state and local affiliates, including the local that represents public school teachers and education personnel in the New York City schools. The AFT represents over 900,000 members who work in public schools, community colleges and universities, state government and health care. The vast majority of AFT members work as teachers and teaching assistants in public elementary and secondary schools, many of which are in school districts with Title I programs similar to that at issue in this case. AFT has a longstanding interest in First Amendment and related constitutional issues impacting on its membership.

***

The *American Jewish Committee* (AJC), a national organization of 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. AJC has strongly supported the constitutional principle of separation of religion and government embodied in the Religion Clauses of the First Amendment, as the cornerstone of American religious liberty. AJC joins as *amicus* to stress that the Court need not, and should not, revisit this long-standing church-state jurisprudence that has served the cause of religious liberty to well. Nowhere is the need to maintain church-state separation greater than in

the context of public schools, where the dangers from utilization of state institutions to advance religious doctrine are the greatest. But, within the contest of Title I--a program expressly designed to aid disadvantaged children--the provision of remedial education services on parochial school premises may be permissible in accordance with the separation principle so long as there are appropriate safeguards to ensure strict compliance with the Constitution.

***

The *Anti-Defamation League* (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle that the above goals and the general stability of democracy are best served through the separation of church and state and the protection of the right to free exercise of religion. In support of this principle, ADL has previously filed *amicus* briefs in numerous cases including *Kiryas Joel v. Grumet*, 512 U.S. 687 (1994); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Aguilar v Felton*, 473 U.S. 402 (1985); *Grand Rapids v. Ball*, 473 U.S. 363 (1985); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

***

The *Baptist Joint Committee on Public Affairs* is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty of all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American

Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

***

The *Central Conference of American Rabbis* (CCAR) is the organized rabbinate of Reform Judaism, consisting of over 1,800 Reform Rabbis throughout North America. CCAR has long affirmed that religious freedom stands as a cornerstone of American democracy, and that the separation of church and state is the bulwark of our nation's commitment to religious freedom. It joins as *amicus* in this case in support of that principle.

***

The *National Education Association* (NEA) is a nationwide employee organization, which (through a network of state and local affiliates) represents some 2.5 million employees in public school districts, colleges, and universities throughout the United States. NEA long has been committed to the constitutional principle of separation between church and state, and has participated as an *amicus* in many of this Court's cases involving the application of this principle in public education.

***

The *National Jewish Community Relations Advisory Council* (NJCRAC) is an umbrella organization comprising the following national member organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai B'rith, Hadassah, Jewish War Veterans of the

United States of America, Jewish Labor Committee, National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of Conservative Judaism, Women's League for Conservative Judaism, Women's American ORT; as well as 117 community member agencies representing all major Jewish communities in the United States (listed in Appendix B). The Union of Orthodox Jewish Congregations of America does not join in this brief, having joined in an *amicus* brief in support of Petitioners.

As the national planning and coordinating body for the field of Jewish community relations and the public-affairs instrumentality for Jewish communities around the country, dedicated to preserving the principles embodied in the Bill of Rights, NJCRAC believes that the separation of church and state is an essential bulwark in maintaining the individual, group, and political equality of all Americans.

***

People For the American Way (People For) is a nonpartisan, education-oriented citizen's organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 310,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights and promote effective public education, including cases concerning both the free exercise of religion and separation of church and state. People For has joined in filing this *amicus* brief in order to help vindicate the important First Amendment principles at stake in this case, particularly the principle that government should not directly support or become unduly entangled with religion.

***

The *Union of American Hebrew Congregations* (UAHC) represents 1.5 million Reform Jews in 850 congregations nationwide. For over a century, the UAHC has fought for religious liberty and tolerance, believing these to be among the greatest gifts America has bestowed upon the world. The UAHC has participated as *amicus* in a wide array of religious liberty cases, often before the United States Supreme Court. Recent Supreme Court *amicus* participation includes *Board of Education of the Kiryas Joel Village School District v. Louis Grumet* (1993) and *City of Boerne v. Texas v. P.F. Flores, Archbishop* (1997).

APPENDIX B

APPENDIX B

COMMUNITY MEMBER ORGANIZATIONS OF THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

Birmingham JCC*
Greater Phoenix Jewish Federation
Tucson Jewish Federation of Southern Arizona
Greater Long Beach and West Orange County Jewish Community Federation
Los Angeles CRC** of Jewish Federation-Council
Oakland Greater East Bay JCRC***
Orange County Jewish Federation
Sacramento JCRC
San Diego CRC of United Jewish Federation
San Francisco JCRC
Greater San Jose JCRC
Greater Bridgeport Jewish Federation
Greater Danbury CRC of Jewish Federation
Eastern Connecticut Jewish Federation
Greater Hartford CRC of Jewish Federation
New Haven Jewish Federation
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
JCRC of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington JCC
South Broward Jewish Federation
Greater Fort Lauderdale Jewish Federation
Jacksonville Jewish Federation
Greater Miami Jewish Federation

Greater Orlando Jewish Federation
Palm Beach County Jewish Federation
Pinellas County Jewish Federation
Sarasota-Manatee Jewish Federation
South County Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council
Metropolitan Chicago JCRC of the Jewish United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis JCRC
South Bend Jewish Federation of St. Joseph Valley JCRC of Indiana
Greater Des Moines Jewish Federation
Lexington Central Kentucky Jewish Federation
Louisville Jewish Community Federation
Greater Baton Rouge Jewish Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish Federation-Community Council
Baltimore JCRC
Greater Boston JCRCC
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit JCC
Flint Jewish Federation
Minneapolis Minnesota and Dakotas JCRC-Anti-Defamation League
Greater Kansas City Jewish Community Relations Bureau
St. Louis JCRC

Omaha JCR Committee of Jewish Federation
Atlantic County Federation of Jewish Agencies
Central New Jersey Jewish Federation
Clifton-Passaic Jewish Federation
Delaware Valley Jewish Federation
Metrowest United Jewish Federation
Greater Middlesex County Jewish Federation
Northern New Jersey JCRC
Southern New Jersey JCRC Jewish Federation
Albuquerque JCC
Binghampton Jewish Federation of Broome County
Greater Buffalo Jewish Federation
Elmira CRC of Jewish Welfare Fund
Greater Kingston Jewish Federation
Northeastern New York United Jewish Federation
Greater Orange County Jewish Federation
Rochester Jewish Community
Syracuse Jewish Federation
Utica Jewish Federation
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati JCRC
Cleveland Jewish Community Federation
Columbus CRC of Jewish Federation
Greater Dayton CRC of Jewish Federation
Greater Toledo CRC of Jewish Federation
Youngstown JCRC of Jewish Federation
Oklahoma City JCC
Tulsa JCC
Portland Jewish Federation
Allentown CRC of Jewish Federation
Erie JCC
Greater Philadelphia JCRC

Pittsburgh CRC of United Jewish Federation
Scranton-Lackawanna Jewish Federation
Greater Wilkes-Barre Jewish Federation
Providence CRC of Rhode Island Jewish Federation
Charleston JCR Committee
Columbia CRC of Jewish Welfare Federation
Memphis JCRC
Nashville and Middle Tennessee Jewish Federation
Austin JCC
Greater Dallas JCRC of Jewish Community Federation
El Paso JCR Committee
Fort Worth Jewish Federation
Greater Houston Jewish Federation
San Antonio JCR of Jewish Federation
Newport News-Hampton United Jewish Community of the Virginia Peninsula
Richmond Jewish Community Federation
Tidewater United Jewish Federation
Greater Seattle Jewish Federation
Madison JCC
Milwaukee Jewish Council

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* JCC - Jewish Community Council
** JCRC - Jewish Community Relations Council
*** CRC - Community Relations Committee or Council

(20) (21)

Nos. 96-552, 96-553

Supreme Court, U.S.
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In the Supreme Court of the United States
October Term, 1996

Rachel Agostini, *et al.*,
Petitioners,

and

Chancellor of the Board of Education, *et al.*,
Petitioners,

v.

Betty-Louise Felton, *et al.*,
Respondents.

On Writ of *Certiorari*
To The United States Court of Appeals
For The Second Circuit

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DISCLOSURE STATEMENT

This Brief *Amicus Curiae* is authored entirely by the undersigned counsel on behalf of *amici*. No person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

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INTEREST OF AMICI[1]

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

Americans United for Separation of Church and State (Americans United) is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court, including bringing the case of *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985). Americans United has also brought on behalf of its members several challenges to the implementation of Title I with respect to parochial schools. *See Walker v. San Francisco Unified School Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991). The resolution of this case is therefore of special concern to Americans United and its members.

AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION

The American Civil Liberties Union (ACLU) is a nationwide nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. The ACLU has appeared before this Court in numerous church-state

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.

cases. For example, the ACLU represented the plaintiffs in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (upholding claim under the Free Exercise Clause), and *Lee v. Weisman*, 505 U.S. 577 (1992) (upholding claim under the Establishment Clause). The ACLU also filed an *amicus curiae* brief in *Aguilar v. Felton*, 473 U.S. 402 (1985). The resolution of this case, which seeks to overturn *Aguilar*, therefore involves a matter of direct concern to the ACLU and its members.

STATEMENT OF THE CASE

This case presents the Court with two important questions that may, depending on their resolution, dramatically affect both the substance of Establishment Clause jurisprudence and the manner in which many controversies are brought before the Court. This present case had its origins twelve years ago in the Court's decision of *Aguilar v. Felton*, 473 U.S. 402 (1985). There, this Court ruled that the Establishment Clause (in particular, concerns over excessive government entanglement with religion) barred the provision of Title I remedial and other educational services on the premises of parochial schools. Following that holding, the U.S. District Court for the Eastern District of New York entered a permanent injunction prohibiting the Secretary of Education and the Chancellor and Board of Education of New York City from using public funds to provide educational services on parochial school premises.

Since 1985, Title I services in New York City and throughout the nation have been provided to parochial school students through a variety of mechanisms. In some instances, those services have been provided in nearby public schools; in other instances, the local education agencies have leased neutral

sites or mobile instructional units/vans or have offered the services through computer assisted instruction. When mobile instructional units/vans have been used, they are usually parked adjacent to the parochial schools (at times, on parochial school property) for easy access. There is no recorded instance of parochial school students being denied Title I services if so desiring. *See Walker v. San Francisco Unified School Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Board of Educ. v. Alexander*, 983 F.2d 745 (7th Cir. 1992); *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991).

Despite the effective operation of Title I services in this manner for over eleven years, in 1996 the Chancellor and Board of Education moved pursuant to to be relieved from the judgment and continuing injunction, citing financial costs and inconvenience in administering the program to parochial school students. The sole basis for relief under their Rule 60(b) motion was that a change in the law had occurred since this Court's decision in *Aguilar*. The District Court, while agreeing on the appropriateness of the Rule 60(b) procedure, denied the motion due to the absence of a change in the law. The Court of Appeals for the Second Circuit affirmed for substantially the same reasons stated in the District Court's opinion.

SUMMARY OF ARGUMENT

This Court should not sanction this use of Rule 60(b). Petitioners are not seeking to be relieved from a judgment as a result of a change in the law but are instead attempting to use Rule 60(b) to bring about a change in the law by obtaining reconsideration of *Aguilar v. Felton*. Such use of Rule 60(b) will threaten the finality of judgments, destabilize constitutional jurisprudence, and burden court dockets through excessive

filings as parties seek to be relieved from long-standing judgments.

In support of their urging that *Aguilar* be reversed, the Chancellor and supporting *amici* proffer a view of government "neutrality" toward religion that is inconsistent with Establishment Clause jurisprudence. While this Court has long embraced principles of neutrality for Religion Clause adjudication, it has always rejected the view that neutrality requires the funding of religious institutions and activities. Contrary to claims of petitioners, this Court's more recent Establishment Clause decisions are consistent with this traditional view of neutrality.

The principles enunciated in *Lemon v. Kurtzman* are also consistent with this traditional view of neutrality and remain central to Establishment Clause adjudication. In particular, the ban on excessive entanglements is key to preserving religious autonomy and ensuring the equal treatment of all religions. As such, it is a vital element of Establishment Clause jurisprudence.

This Court's decision in *Aguilar* was correctly decided, based on well-founded concerns of ongoing monitoring and review of not just public employees, but also parochial school activities. In addition, the placement of public employees in parochial schools via Title I raises other Establishment Clause risks, primarily through the massive infusion of public monies into parochial schools and the appearance of a joint operation between public and religious school officials.

ARGUMENT

I. Rule 60(b) is an Inappropriate Vehicle for Reconsidering this Court's Holding in *Aguilar v. Felton*.

This Court should not sanction this use of Rule 60(b). Petitioners are not seeking to be relieved from a judgment as a result of changed circumstances or a change in the law, but are instead attempting to use Rule 60(b) to bring about that very change by obtaining reconsideration of *Aguilar v. Felton*, 473 U.S. 402 (1985). This use of Rule 60(b) to reconsider the *Aguilar* decision is both unprecedented and problematic.[2]

Petitioners' sole basis for contending that they are entitled to reconsideration of the decision they lost twelve years ago is that the legal rationale behind *Aguilar* is no longer valid. In this regard, petitioners rely on: (1) statements contained in the concurring and dissenting opinions in *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2498, 2505, 2515 (1994); and (2) claims of a general shift in Court jurisprudence, including the assertion that this Court has abandoned the "no funding" prohibition in favor of the "neutrality" principle. Each of these rationales fails under scrutiny.

Petitioners rely principally on a combination of statements about *Aguilar* made in dicta by five of the justices in *Kiryas Joel*, not on an actual holding by this Court. Dicta statements in concurring and dissenting opinions do not

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[2] A fuller discussion of the Rule 60(b) issue is contained in the *Amicus* Brief of the New York County Lawyers Association, Committee on Supreme Court of the United States, which undersigned *amici* incorporate by reference.

constitute a change in the law sufficient to warrant relief under Rule 60(b). Rather, the Court has long held that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("this Court does not decide important questions of law by cursory dicta inserted in unrelated cases."). Petitioners' attempts to confer precedential value on dicta should be rejected by this Court.

Petitioners also rely on the contention that the law concerning public funding of religious institutions and excessive entanglement with religion has eroded in the last decade. As will be discussed *infra*, this Court has not retreated from its prohibition on government advancement of or involvement in religious matters, especially where it concerns parochial school education. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993).

As a result, it is clear that petitioners seek to affect a change in the law, not to benefit from a change that has already taken place. Rule 60(b) is an inappropriate vehicle for such proactive purposes. Furthermore, allowing petitioners to obtain reconsideration of their case under Rule 60(b) would destabilize the future of constitutional jurisprudence, undermine the finality of judgments, and disrupt *stare decisis*. The floodgates would be opened for litigants to seek review of prior judgments on the basis of "justice counting." Any criticism by a sitting justice of an earlier holding would invite parties to mount a Rule 60(b) petition claiming the law had "changed." Allowing Rule 60(b) to be used in this manner undermines the integrity of this Court's decisions and our judicial system. It should not be condoned.

II. The Court's Prohibition on Government Funding of Religion is Consistent with Principles of Neutrality Toward Religion.

A. This Court has Consistently Rejected a View of Neutrality that Requires Funding of Religion.

As part of their attack on the holding in *Aguilar*, the Chancellor and his supporting *amici* insist that an "irreconcilable conflict" exists in Establishment Clause jurisprudence, a conflict that can be resolved only by this Court's adoption of "neutrality" as the guiding principle for Religion Clause adjudication. Chancellor Brief at 25-30; Brief of Christian Legal Society, *et al.* at 6-14; Brief of Pacific Legal Foundation at 17-19. Under their proposed version of neutrality, the direct funding of inherently religious activity would be permissible provided it occurs through a general government program made available to all. As applied to the issue of Title I and other education programs, this neutrality principle would allow parochial schools to participate in such programs in the same manner and to the same extent as public schools, even if the educational funding or services were found to advance the parochial schools' religious missions or to involve the state directly in the religious educational function.[3]

This notion of neutrality is inconsistent with the principles underlying the Establishment Clause, and its

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[3] As a threshold matter, it is unnecessary for the Court to address this issue even if it is inclined to reverse *Aguilar*. Neither the Agostini petitioners nor the Secretary of Education advocates the adoption of a strict neutrality approach to Establishment Clause adjudication. As the Agostini petitioners acknowledge, "[n]eutrality or evenhandedness may not be sufficient to save a program of government aid that directly funds or subsidizes religious activity." Agostini Brief at 13.

adoption would cause a wholesale revision of the Court's past and current church-state jurisprudence. Although the Court has often spoken in terms of neutrality toward religion,[4] it has never permitted the government to fund sectarian activities under the guise of neutrality. While the Court has long allowed religious institutions to participate in general government programs, it has always been on the condition that the benefits or services derived from such participation could not be used for religious purposes or to displace religious functions. *See Bradfield v. Roberts*, 175 U.S. 291, 297-98 (1899); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977); *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988). Thus, even when a general program is religiously neutral on its face, the Court has "always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion." *Kendrick*, 487 U.S. at 609.

The Court's college funding decisions present a case-in-point on the limits to the neutrality principle.[5] In all three cases, the Court allowed church-related colleges to participate in generally available public grant, loan and revenue bond programs for secular activities of the institutions. Based on the lack of evidence that any funds would be used for religious purposes, the Court held that the church-related colleges could

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[4] *Abington School Dist. v. Schempp*, 374 U.S. 203, 222, 225 (1963) ("wholesome neutrality"); *Walz v. Tax Commission*, 397 U.S. 664, 668-669 (1970) ("benevolent neutrality"); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 745 (1976) ("scrupulous neutrality").

[5] *Roemer, supra*; *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton, supra.*

participate in those general funding programs.[6] At the same time, however, the Court stressed that government "funds [may] not be used to support specifically religious activity.'" *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 759 (1976).[7] Anticipating the broad neutrality argument made in this case, the *Roemer* Court explained that "a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to religious activity." *Id.* at 747. Under the Establishment Clause, government cannot "pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes aid available to secular and religious institutions alike." *Id.*

The neutrality principle, of course, is not limited to religion cases. It is an overarching principle that applies throughout the First Amendment. Indeed, some of the earliest cases that expressly applied the neutrality principle involved the intersection between religion and speech. *See Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotoko v. Maryland*, 340 U.S. 268 (1951). Departures from the neutrality principle trigger strict scrutiny. In the religion context, however, the government's obligation to comply with the Establishment Clause is a compelling interest that satisfies the strict scrutiny standard. *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981). Invocation of the neutrality standard, therefore, begins the

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[6] The Court emphasized in each case that the church-related colleges were nonsectarian in character and were prohibited under the respective statutes from using public funds for any religious purpose. *Roemer*, 426 U.S. at 740, 743; *Hunt*, 413 U.S. at 736-37; *Tilton*, 403 U.S. at 675.

[7] Accordingly, in *Tilton*, the Court struck down that provision of the Higher Education Facilities Act, 20 U.S.C. § 745 (b)(2), that placed only a twenty year cap on the ability of recipient institutions to use funded facilities for sectarian instruction and religious worship. *Tilton*, 403 U.S. at 683.

analysis; it does not end it. As Justice Harlan observed twenty-nine years ago, neutrality is "a coat of many colors" that on its own offers "no simple or clear measure" for achieving the goals promoted by the Establishment Clause. *Board of Education v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

Although those goals have been articulated in various ways, *see Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947), this Court has not wavered from its view that the Establishment Clause was designed, at a minimum, to prevent the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970); *accord Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 381 (1985). As described below, numerous decisions of this Court hold that government funding of religious activities violates the Establishment Clause. Accordingly, even a facially neutral government program cannot be sustained if it violates, either singly or cumulatively, any of the other indicia of government support for religion that this Court has identified in its Establishment Clause cases.

The prohibitions on sponsorship, support, and involvement,[8] while in part designed to enhance the religious liberty goals of the Free Exercise Clause, also serve other ends: they guarantee religious equality among sects as well as

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[8] *See Allegheny County v. ACLU*, 492 U.S. 573, 593-594 (1989) (the Establishment Clause prohibits "endorsement, favoritism, or promotion," of religion); *Ball*, 473 U.S. at 385 (the Establishment Clause "does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (the purpose of the Establishment Clause is "to prevent, as far as possible, the intrusion of either into the precincts of the other.").

between believers and nonbelievers; in addition, they protect the integrity of religion and civil institutions in ways that the Free Exercise Clause cannot. *See Ball*, 473 U.S. at 382; *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962). As such, the Establishment Clause does more than mimic the Free Exercise Clause. Leonard Levy, The Establishment Clause (1986) at ix. As Justice Blackmun observed recently, "it is not enough that the government restrain from compelling religious practices: It must not engage in them either. . . . The Establishment Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a de..iocracy and a strong religious community -- both essential for safeguarding religious liberty." *Lee v. Weisman*, 505 U.S. 577, 604, 606 (1992) (Blackmun, J., concurring).

The use of public funds to advance religious doctrines is irreconcilable with these core principles of the Establishment Clause. *Ball*, 473 U.S. at 385 ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."); *accord Kendrick*, 487 U.S. at 612. Indeed, this Court has long affirmed the funding limitations of the Establishment Clause, even in cases that otherwise upheld religious accommodations. *E.g.*, *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) ("Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person."). As Justice O'Connor stated in *Kendrick*, "*any* use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 623 (O'Connor, J., concurring) (emphasis in original).

For fifty years, therefore, the Court has rejected the

simplistic notion that neutrality requires the government to treat religion and non-religion alike in all respects, especially when that principle would result in the state funding or sponsorship of religious instruction. Instead, the Court has recognized that neutrality "may not suffice by [itself] to achieve in all cases the purposes of the First Amendment." *Walz*, 397 U.S. at 695 (Harlan, J., concurring). This Court's traditional view of neutrality -- which allows many religious entities to participate in government programs upon the condition that secular benefits are not applied to religious purposes -- is entirely consistent with Establishment Clause goals. *See Rosenberger v. Rector & Visitors of University of Virginia*, 115 S. Ct. 2510, 2526 (1995) (O'Connor, J. concurring) ("the neutrality principle and the funding prohibition are . . . of equal historical and jurisprudential pedigree").[9] The Court should reaffirm that the "course of constitutional neutrality" cannot "be an absolute straight line; rigidity could well defeat the basic purpose of [the Religion Clauses], which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz*, 397 U.S. at 669.

B. The Court's Recent Establishment Clause Decisions do not Support an Expanded Notion of Neutrality.

The Court's more recent funding cases are consistent with this traditional view of neutrality. Contrary to petitioners'

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[9] "Our cases have permitted some government funding of secular functions performed by sectarian organizations. [Citing to *Kendrick*, 487 U.S. at 617; *Roemer*, 487 U.S. at 642; *Bradfield*, 175 U.S. at 299-300.] These decisions, however, provide no precedent for the use of public funds to finance religious activities." *Rosenberger*, 115 S. Ct. at 2525 (O'Connor, J., concurring).

claims, the Court has not deviated from the rule that the Establishment Clause prohibits the use of public funds to pay for religious activity, even when the funds are administered through neutral government programs. In *Bowen v. Kendrick*, the Court upheld the facial constitutionality of the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z *et seq.* (1988), as well as the general eligibility of religious organizations to receive funding for providing services under the Act. Significantly, however, the Court remanded the case to the district court to determine whether AFLA funds were going to pervasively sectarian organizations or were being used to promote religious activities of the recipient institutions. 487 U.S. at 621-22. While some of the justices were divided over the eligibility of certain institutions, the Court was unanimous in holding that public funds could not be "used to further religion," even when administered under a general benefit program. *Id.* at 624 (Kennedy, J., concurring). As the Chief Justice stated, "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religious affiliated institutions does not have the primary affect of advancing religion." *Id.* at 609.

Similarly, in *Zobrest*, the Court found no constitutional prohibition to using funds under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (1988), to pay for a sign language interpreter for a hearing impaired student attending a parochial school. 509 U.S. at 10. The Court reiterated that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Id.* at 8. But, consistent with the rule in *Kendrick*, the Court also found no evidence that the interpreter

was involved in the instructional process or that the parochial school accrued any financial benefit from the presence of the interpreter. *Id.* at 10-12 (distinguishing the earlier aid cases of *Meek* and *Ball* which involved "direct grants of government aid [which] relieved sectarian schools of costs they otherwise would have borne"). Evidence that public monies would be used to further the religious program of the host parochial school would have required a different resolution of the case, notwithstanding the neutral character and general availability of IDEA funds.[10]

Finally, the decision in *Rosenberger*, while factually distinguishable from the above funding cases, is also consistent with the Court's long-standing position towards neutrality. There, the Court held that the Establishment Clause did not bar a student religious newspaper from receiving a share of student fees under a university program designed to enhance student free speech.[11] Yet, while affirming the importance of neutrality

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[10] In fact, the regulations implementing IDEA, like numerous other federal statutes and regulations, prohibit religious affiliates from using federal funds for any religious purpose, including religious worship, instruction, or proselytization. 34 C.F.R. § 76.532(a) (1994). *See also* the Hill-Burton Act, 42 U.S.C. § 291 *et seq.* (1988); the American Schools and Hospitals Abroad Program, 22 U.S.C. § 2174 (1988); the Emergency Shelter Grants Program, 42 U.S.C. §§ 11371-11378 (1988 and Supp. 1994); and the Child Care and Development Block Grant of 1990, 42 U.S.C. § 9858 (Supp. 1992).

[11] *Rosenberger* is distinguishable from the educational funding decisions in that it involved the equivalent of a public square that provided a largely unregulated platform for various forms of student expression. As such, it is more similar to the holdings in *Capitol Square Review and Advisory Board v. Pinette*, 510 U.S. 1307 (1995); *Lambs Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Education v. Mergens*, 496 U.S. 226 (1990); and *Widmar, supra*. *See* Kathleen M.

in resolving the case, the Court also acknowledged the limitations of that principle. 115 S. Ct. at 2523 (noting the constitutional problems that would be presented in "a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity").[12] Citing to those earlier decisions involving general government programs such as *Kendrick* and *Roemer*, the Court acknowledged the "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Id.* As Justice O'Connor reiterated, *Rosenberger* does not "trumpet[] the supremacy of the neutrality principle nor signal[] the demise of the funding prohibition in Establishment Clause jurisprudence." *Id.* at 2528 (O'Connor, J., concurring).

Accordingly, in its post-*Aguilar* decisions, the Court has reaffirmed the crucial role of the "no-religious funding" principle in Establishment Clause jurisprudence. While affirming that notions of neutrality permit religiously affiliated institutions to participate in general government programs and apply those benefits toward secular ends, the Court has continued to prohibit the extension of such aid where it has the effect of subsidizing a religious function or brings about "the direct and substantial advancement of religious activity." *Zobrest*, 509 U.S. at 10-12.

Sullivan, "Parades, Public Squares and Voucher Payments: Problems of Government Neutrality," 28 Conn. L. Rev. 243-260 (1996).

[12] "Evenhandedness is therefore a prerequisite to further inquiry into the constitutionality of a doubtful law, but evenhandedness goes no further. It does not guarantee success under Establishment Clause scrutiny." *Id.* at 2541 (Souter, J., dissenting).

III. The Principles Enunciated in *Lemon v. Kurtzman* Remain Central to Establishment Clause Adjudication.

A. There is no Reason for this Court to Reconsider the *Lemon v. Kurtzman* Standard.

The Agostini petitioners and several supporting *amici* criticize the test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and urge this Court to repudiate it in whole or in part. This attack on *Lemon*, however, is largely a diversionary tactic. The *Lemon* test is merely a distillation of Establishment Clause principles articulated over time in the Court's decisions. It has never represented more than a set of broad guidelines for determining Establishment Clause controversies. As the Court has recognized, these guidelines serve as "helpful signposts" in each particular case, *Hunt*, 413 U.S. at 741; they do not represent a "single constitutional caliper" for decision making. *Tilton*, 403 U.S. at 677. Indeed, the Court has declared its "unwillingness to be confined to any single test or criterion in this sensitive area," *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). Its decisions over the past dozen years reflect this nuanced approach. *See Kiryas Joel, supra* (preferential treatment; unlawful delegation of authority); *Lee, supra* (coercion); *Allegheny County v. ACLU*, 492 U.S. 573 (1989) (endorsement); *Marsh v. Chambers*, 463 U.S. 783 (1983) (historic).

Lower courts, as well, have recognized that the principles of the Establishment Clause are more important than any particular formulation and have not restricted their analysis to the *Lemon* factors. *See e.g. Ingebretsen v. Jackson Public Schools*, 88 F.3d 274 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. of Educ.*,

84 F.3d 1471 (3d Cir. 1996); *Harris v. Joint Sch. Dist.*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 115 S. Ct. 2604 (1995); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir.), *cert. denied*, 113 S. Ct. 2950 (1993); *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994); *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993). As a result, claims of confusion among lower courts are overstated. Conversely, many recent applications of the *Lemon* test have resulted in holdings that even petitioners and their *amici* would not consider to be hostile to religion. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Kendrick, supra.* Apparently, the complaint here is not so much with the application of *Lemon* itself but with the outcome of particular cases with which petitioners and their *amici* disagree. This does not represent a sensible rationale for reversing an analytical standard that has been an important part of Establishment Clause jurisprudence for thirty years. *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984) ("any departure from the doctrine of *stare decisis* demands special justification").

B. The Lemon Principles Remain Vital and Important to Establishment Clause Adjudication.

Although less frequently invoked in recent years, the *Lemon* test still represents this Court's best articulation of the principles and goals underlying the Establishment Clause.[13] In

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[13] In recent years, the Court has refined the *Lemon* test to emphasize an "endorsement or disapproval" inquiry first proposed by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. at 687-694. Under this reformulation, the critical inquiry is whether the government's action has either the actual purpose or effect of endorsing or disapproving of religion. *Allegheny*, 492 U.S. at 592-594; *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987).

order to guard against prohibited government "sponsorship, financial support, and active involvement . . . in religious activity," the Court fashioned a test based on the "cumulative criteria" of its earlier decisions. *Walz*, 397 U.S. at 688; *Lemon*, 403 U.S. at 612. These "numerous precedents" have become firmly rooted'" in the Court's jurisprudence and their basic principles have guided Establishment Clause adjudication for over thirty years. *Wolman*, 433 U.S. at 236 (quoting *Committee for Public Education v. Nyquist*, 413 U.S. 756, 761 (1973)).[14]

The requirement that government policies and legislation be based on legitimate secular rationales does not impose an undue burden on legislators but instead rests on the premise that laws should be based on secular policy considerations, and that matters of religion are outside the cognizance of civil authorities. *See McGowan v. Maryland*, 366 U.S. 420, 449-51 (1961). As Justice O'Connor stated in *Wallace v. Jaffree*: "[i]t is not a trivial matter . . . to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws." 472 U.S. 38, 75 (1985) (O'Connor, J., concurring); *accord Edwards v. Aguillard*, 482 U.S. 578, 587 (1987). This requirement, in fact, finds its basis in some of the nation's earliest church-state decisions where courts first identified the necessity of secularly based legislation in a religiously heterogenous democracy. *See Thomasson v. State*, 15 Ind. 449, 454 (1860); *McGatrick v. Wason*, 4 Ohio St.

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[14] *See Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (A law is constitutionally invalid if its "purpose or effect . . . is to impede the observance of one or all religions or is to discriminate invidiously between religions . . .."); *Abington School Dist.*, 374 U.S. at 222 ("The test may be stated as follows: what are the purpose and the primary effect of the enactment?"). *See also* Daniel O. Conkle, "Lemon Lives," 43 Case W. Res. L. Rev. 865, 869 (1993) (the *Lemon* test "clearly recognizes that Establishment Clause analysis is a matter of degree").

566, 571-72 (1855).

The notion that the primary effect of a law should not advance or inhibit religion also has its roots deep in our jurisprudence. *See Everson*, 330 U.S. at 8-16 (tracing the historic influences behind the Establishment Clause); *Zorach*, 343 U.S. at 315. This prohibition is based on at least two premises. First, government advancement of religion is inherently a coercive and divisive process, either through the enforced financial support of religion or through the placement of government power and prestige behind particular articles of faith. *Everson, supra*; *Lynch*, 465 U.S. at 688, 692 (O'Connor, J., concurring). Second, the ban on advancing or inhibiting religion recognizes that "a union of government and religion tends to destroy government and degrade religion" and causes people to lose "their respect for any religion that . . . relie[s] upon the support of government to spread its faith." *Engel*, 370 U.S. at 431. As such, government may impermissibly advance religion by involving itself too closely in religious activities or functions, thereby threatening the integrity of both institutions and leading to perceptions of favoritism of particular sects.

Without the protection of these interests, and those promoted by nonentanglement, *see* pp. 20-23, *infra*, the Establishment Clause would revert to little more than a rule prohibiting the formal structures of an established church. Such a cramped view of the Establishment Clause is irreconcilable with our history and this Court's decisions, and ignores the "myriad, subtle ways in which Establishment Clause values can be eroded" and religion advanced by the government. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

C. Entanglement is a Necessary Component of Establishment Clause Jurisprudence.

The ban on excessive government entanglements with religion has a pedigree that is much older and broader than the religious funding cases of the 1970s. Even before the drafting of the First Amendment, James Madison warned that excessive government involvement in religious matters would "destroy that moderation and harmony" between the civil and the sacred that was necessary for the success of the new democracy. The tenuous harmony of that era, Madison explained, was due to "the forbearance of our laws to intermeddle with Religion . . .." Memorial and Remonstrance ¶ 11 (reprinted in Appendix to *Everson*, 330 U.S. at 69). Judicial concerns over government intrusion into religious affairs and the corresponding threats to religious autonomy such entanglements produce go back at least as far as the Court's 1872 decision in *Watson v. Jones*, 80 U.S. 666, 677 (1872), where the Court held that judges were neither authorized nor competent to decide internal issues of church governance. Since that time, the Court has frequently decried the "hazards" that accompany excessive government involvement in or oversight of religious matters. *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969); *accord Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (remarking on the "substantial danger that the State will become entangled in essentially religious controversies").

The importance of avoiding government entanglements in religious affairs has been noted in other contexts and relationships, including areas of tax policy, labor relations, and antidiscrimination laws. *Walz*, 397 U.S. at 674-75; *Hernandez v. United States*, 490 U.S. 680, 693-93 (1989); *Jimmy Swaggart Ministries v. Equalization Board of Cal.*, 493 U.S. 378, 393-96

(1990); *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987). For example, in *Hernandez*, the Court concluded that a uniform rule governing charitable deductions had less potential for entangling the IRS in religious matters than one that permitted inquiry into whether the contribution served a religious benefit as opposed to a secular one. 483 U.S. at 694 (noting that the petitioner's proposal would lead to "'pervasive monitoring' for 'the subtle or overt presence of religious matter,' [which] is a central danger against which we have held the Establishment Clause guards," quoting *Aguilar*, 473 U.S. at 413).

As such, the Court's application of the entanglement standard to public funding issues rests on a broad-based concern about avoiding government oversight of and involvement in inherently religious matters. "The objective [of the entanglement prohibition] is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Lemon*, 403 U.S. at 614. At the same time, the test avoids the potential danger that government intrusion into religious affairs will result in the unequal treatment of religious institutions, either through unfamiliarity with matters of faith or through incompetence or design. *Hernandez*, 490 U.S. at 694.

By definition, a funding program is "a relationship pregnant with involvement," and although the existence of oversight is not unique to programs with religious recipients, it is through such oversight that constitutional concerns arise. *Lemon*, 403 U.S. at 621.[15] Because the government "is

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[15] "Although the very fact of neutrality may limit the intensity of involvement, government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning,

constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination," it may be required to engage in the very type of detailed and ongoing monitoring of program recipients that leads to excessive involvement in religious matters. *Levitt v. Committee for Public Education*, 413 U.S. 472, 480 (1973). Such surveillance or involvement is especially problematic with those religious institutions, such as parochial schools, where "religion is so pervasive that a substantial portion of [their] functions are subsumed in the[ir] religious mission[s] . . .." *Hunt*, 413 U.S. at 743; *accord Kendrick*, 487 U.S. at 610. Complaints about the effect of the entanglement prong minimize the constitutional concerns that inevitably accompany the funding of religious institutions.

Moreover, the test is one of "excessive" entanglement and, thus, is "inescapably one of degree." *Walz*, 397 U.S. at 674-75; *accord Roemer*, 426 U.S. at 766. It is therefore an overstatement to claim that the entanglement prong presents an inescapable "Catch-22" that needlessly excludes religious institutions from participating in important government programs. As this Court's decisions have shown, in some situations religious institutions may participate in government funded programs without undue risk of either advancement or excessive entanglement with religion. *See Kendrick*, 487 U.S. at 615-17; *Committee for Public Education v. Regan*, 444 U.S. 646, 660 (1980); *Roemer*, 426 U.S. at 766. In many other situations, adjustments can be made in the way programs operate to ensure that unnecessary entanglements are avoided. *Aguilar, supra.* Appropriately understood and applied, the entanglement prong operates for the benefit of both religion and

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may escalate to the point of inviting undue fragmentation." *Walz*, 397 U.S. at 695 (Harlan, J., concurring).

civil society, at times insisting on long-term goals in place of short-term gains. Its function is essential for Religion Clause jurisprudence, and it should be retained as an independent test.

III. The Court's Decision in *Aguilar v. Felton* was Based on Well-Founded Concerns of Excessive Entanglement with Religion.

This Court's decision in *Aguilar* reflects the important goals behind the entanglement prong. Like the programs struck down in *Lemon* and *Meek*, Title I utilizes teachers to perform instructional functions which are indistinguishable from many of the core educational functions performed by the parochial schools.[16] As Justice Brennan recognized, public employees teaching in religious environments may be subject to subtle or overt pressure to tailor the substance of their instruction to conform to the mission of the religious school. *Aguilar*, 473 U.S. at 409. At a minimum, they will seek to avoid perceived conflicts between their duties and the schools' doctrinal positions. However, public education officials "must be certain, given the [command of the] Religion Clauses, that [publicly] subsidized teachers do not inculcate religion." *Lemon*, 403 U.S. at 619. In order to be true to this command, intrusive and ongoing monitoring will be inevitable and unavoidable.

Petitioners do not deny the inevitability of monitoring. Instead, they claim that entanglement concerns do not arise when only public school teachers are being monitored. That

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[16] "The key role played by teachers in [a parochial] school system had been the predicate for our conclusions that government aid channeled through teachers creates an impermissible risk of excessive government entanglement in the affairs of the church-operated schools." *Catholic Bishop*, 440 U.S. at 501.

claim oversimplifies the integrated nature of the Title I services. Unlike the provision of health services, for example, remedial education is closely tied to the educational function of the parochial school, thereby necessitating greater contact and coordination with parochial school teachers and officials. It is entirely predictable that these contacts will increase when public school teachers and parochial school teachers work side-by-side in the same buildings.[17] Such contacts will inevitably lead to comparisons of course content which may involve issues of religious doctrine or administration. It is therefore naive to suggest that monitoring can be limited to the activities of the public employees and not involve religious matters. Government involvement in issues of religious significance, which now are avoided through the separate operations, will become more frequent through the enhanced day-to-day relationship, and will in turn invite greater opportunity for government judgments on matters of faith. *See Lemon*, 403 U.S. at 620. These are the very type of intrusive activities the no-entanglement requirement is designed to avoid.

Accordingly, the *Aguilar* Court correctly found that the avoidance of excessive entanglement required that Title I services occur off parochial school premises. That holding was a constitutionally reasonable one. In order to avoid *ab initio* those hazards that would accompany the detailed monitoring and close pedagogical and administrative contact necessitated by placing public teachers in sectarian schools, the Court reasonably found that application of Title I unconstitutional.

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[17] *See* Findings of Fact in *Helms v. Cody*, 856 F. Supp. 1102, 1116-18 (E.D. La. 1994), regarding the increased level of interaction and the blurring of roles between public and private school employees under state program that places public school teachers in parochial schools.

IV. The Risk of Entanglement is Not the Only Establishment Clause Flaw in the Title I Program.

Even assuming, *arguendo*, that the entanglement problems identified by Justice Brennan in 1985 could be resolved -- and no one suggests that there has been any fundamental change in the structure of Title I during the intervening years -- the fact remains that petitioners are seeking permission to spend millions of federal tax dollars to place public school teachers in parochial schools for instructional purposes on an ongoing basis. This Court has never sustained such a massive program of aid to education in the parochial schools, nor has this Court ever allowed public school teachers and parochial school teachers to work side-by-side in the joint enterprise of educating parochial school students. Contrary to petitioners' assertion, therefore, *Aguilar* is not an anomaly in this Court's Establishment Clause jurisprudence. Rather, it is petitioners who seek to undermine a shared understanding of the Establishment Clause that the Court has reaffirmed on numerous occasions over the past fifty years.[18]

Petitioners argue that Title I can no longer be viewed as a program of public support for parochial education after *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest*, 509 U.S. 1. Those cases, however, cannot support the weight that petitioners place on them. Both

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[18] It is not surprising that Justice Brennan's opinion in *Aguilar* focused on entanglement since New York City attempted to defend its program primarily by relying on the "system of monitoring" it had put into place. 473 U.S. at 409. The concluding paragraph of Justice Brennan's opinion, however, emphasizes that the on premises operation of Title I is constitutionally flawed both because of "excessive entanglement" and because of "the benefits" it advances to pervasively sectarian educational institutions. *Id.* at 414.

cases dealt with a singular application of a government program that did not result in the substantial funding of religious education. Accordingly, the financial benefit received by the sectarian schools in those cases could be described as an "attenuated" one. *Zobrest*, 509 U.S. at 8; *Witters*, 474 U.S. at 488. Here, by contrast, New York City is seeking to have its public schools teachers provide continuing instruction to approximately 22,000 students each year in the parochial schools. Considering both the massive expenditures and the instructional nature of the services under Title I, the benefit to parochial schools can hardly be characterized "attenuated." This distinction is consistent with *Zobrest* itself, where the Court carefully distinguished *Meek* on the ground that it involved "massive aid" for instruction in the parochial schools, 509 U.S. at 11.[19] By any reasonable measure, the Title I program is much closer to the massive aid program struck down in *Meek* than the "attenuated" aid upheld in *Zobrest* and *Witters*.

Amici acknowledge that the massive nature of an aid program, on its own, may not render that program infirm under the Court's jurisprudence. But when the size of a program is combined with other factors, such as the funding of educational functions and its operation inside parochial schools, the benefit to sectarian schools becomes undeniable.

Petitioners' emphasis on the fact that Title I funds are designed to "supplement, not supplant" parochial school programs also collapses under scrutiny. *See* 20 U.S.C. §6322(b)(1); 34 C.F.R. §200.23(a). Their theory seems to be that because Title I funds can only be used for "supplementary"

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[19] As this Court also recognized in *Zobrest*, teachers are different because their function goes to the very essence of the educational enterprise. 509 U.S. at 13.

services, albeit on parochial school campuses, they do not "relieve[] sectarian schools of costs they otherwise would have borne in educating their students." *Zobrest*, 509 U.S. at 12. Unfortunately for petitioners, the *Zobrest* Court places *Meek* on the prohibited side of that constitutional line. If remedial education was not regarded as a supplementary service in *Meek*, it is not a supplementary service under Title I either. *Accord Wolman*, 433 U.S. at 244 (contrasting diagnostic services from instructional services which are "closely associated with the educational mission of the non-public school").

Moreover, the statutory and regulatory language cited by petitioners is not nearly as clear as they suggest. A parochial school that provides remedial instruction for its underachieving students is still eligible for Title I funding so long as it does not reduce any money spent from its own budget, 20 U.S.C. §6322(b)(1), or the level of services it was previously providing, 34 C.F.R. §200.12(a). What the statute does not address and what the record does not reveal is whether the parochial schools would have felt obligated to increase their own spending for remedial education in the absence of Title I funding. If parochial schools would have increased their spending for remedial education but for Title I, the distinction between "supplemental" and "supplant" becomes largely illusory.

Finally, petitioners contend that Title I does not subsidize religious education because it is earmarked exclusively for secular instruction delivered exclusively by public school employees. Thus, petitioners assert, Title I is best understood as a child benefit program rather than as a program that impermissibly aids parochial schools. This Court has taken a more realistic approach, recognizing that at some point the infusion of money into a pervasively sectarian institution for

instructional purposes becomes so substantial that it violates the Establishment Clause even though it is earmarked for allegedly secular use. *Cf. Meek*, 421 U.S. at 265. *See also Ball*, 473 U.S. at 394 (expressing concern about public schools taking over "entire responsibility" for parochial school education); *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29, 42 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 941 (1974) (warning about "escalating" state aid which "bespeak(s) the invasion of secular authorities in to the affairs of organized religion").

These financial considerations are augmented in this case by the added concern that Title I creates an inescapable link between public school teachers and parochial school teachers who are both engaged in teaching reading and math to the same students in the same buildings. *See Lemon*, 403 U.S. at 612. From the perspective of an impressionable elementary school student, the reasonable assumption is that the public school teacher and the parochial school teacher are participating in a joint enterprise. And, because the parochial school setting is a pervasively sectarian one, *e.g. Meek*, 421 U.S. at 366, it is unlikely that many young students will appreciate that the boundaries of the Title I program do not include sectarian instruction. It is far more likely that a young student will see all the teachers as indistinguishable and all teachers, therefore, as supporting the obvious religious mission of the parochial school.

This Court's concerns over joint enterprises between religious and civil entities are long-standing. Three decades before *Aguilar*, the Court drew a clear distinction between a "release time" program that permitted students to leave public school early for religious instruction at another site, and a program that permitted religious instructors to conduct religious classes in the public schools. Although both programs were

voluntary, the former was upheld, *Zorach*, 343 U.S. at 315, and the latter struck down, *McCollum v. Board of Education*, 333 U.S. 203 (1948). The distinction, Justice Frankfurter explained, flows from constitutional imperative "to abstain from fusing functions of Government and of religious sects . . . ." *Id.* at 227; *cf. Larkin v. Grandel's Den, Inc.*, 459 U.S. 116 (1982). As this Court reaffirmed in *Ball*, when impressionable schoolchildren are involved, government should the take all steps to avoid the "graphic symbol of concert or union or dependency." *Ball*, 473 U.S. at 391, (quoting *Zorach*, 343 U.S. at 312).

More recently, this Court has made the same point using the language of endorsement. For example, in *Allegheny County*, 492 U.S. at 600, the Court struck down the display of a creche in the main lobby of the county courthouse in part because the "display of the creche in this particular physical setting" conveyed the impression that its religious message was linked to the symbols of government that surrounded it. *Cf. Capitol Square Review and Advisory Board v. Pinette*, 510 U.S. 1307 (1995). This case presents the reverse situation. Petitioners would like to portray the Title I program as an enclave of secular instruction unrelated to everything and everyone around it. In the real world, however, that is not the way it is likely to be perceived by a young schoolchild.

Accordingly, there are sound Establishment Clause reasons for prohibiting public employees from teaching in the parochial schools under any circumstances. Nor was *Aguilar* the first case to recognize the propriety of that bright line. The line this Court identified in *Aguilar* is thus constitutionally supportable on several levels. That line should be respected and reaffirmed.

CONCLUSION

Based on the aforementioned reasons, *amici* urge this Court to affirm the decisions below.

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October Term, 1996

AGOSTINI, *et al.*,

Petitioners,

v.

BETTY LOUISE FELTON, *et al.*,

Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

v.

BETTY LOUISE FELTON, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF OF AMICUS CURIAE COUNCIL ON RELIGIOUS FREEDOM IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Council on Religious Freedom ("CRF"), a national, nonprofit organization, exists to uphold and promote the principle of religious liberty. Many of the members of CRF have children enrolled in church-operated schools and are concerned that those continue as distinctive sectarian ministries. Also, several members of the CRF Board have served on the governing bodies of religious educational institutions and appreciate the need for those institutions to be free to convey their religious ideals and to integrate the sponsoring church's religious values with education

Americans for Religious Liberty ("ARL") is a national, nonprofit public interest educational organization dedicated to defending religious liberty, public education, and the constitutional principle of separation of church and state. ARL has been a friend of the court in numerous briefs filed in the United States Supreme Court.

Individual *amici* Mary L. Helms, Amy T. Helms, and Marie L. Schneider are plaintiffs in *Helms v. Cody*, 856 F. Supp. 1102, 1106-22, 1164 (E.D. La. 1994), referred to in footnote 17, page 49, of the brief filed by the Secretary for Education. The Jefferson Parish School District and intervenor-defendants have filed an appeal to that portion of the judgment: (1) declaring that the Louisiana special education statute, La. Rev. Stat. § 17:1941-56, is unconstitutional as administered by the Jefferson Parish Public School System; and (2) permanently enjoining the special education program as administered by the school district. The Jefferson Parish program, partly on the basis of this Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), "permanently enjoined [defendants] from approving, funding, administering, implementing, or in any way providing state-

paid special education teachers to teach core secular subjects in self-contained resource classrooms throughout the school day on the premises of pervasively sectarian schools, ..."

Individual *amicus* Darla Fernandez was one of the plaintiffs in *Holguin v. Sacred Heart School*, filed in the Northern District of California as Case No. C90-20056 JW. That case involved the administration of Chapter 1 in Hollister, California, resulting in a consent judgment in favor of plaintiffs and against the school district permanently enjoining the school district from providing funding and/or school district employees for live instruction under Chapter 1 to students in any facility located on a sectarian school campus. Appendix 20a-24a. All of the plaintiffs in that case were either parents of or former students of the Sacred Heart School, a private Catholic school in Hollister. Appendix 17a.

Individual *amicus* Duane C. Purdy was one of the intervenor-plaintiffs in *Wamble v. Bell*, 598 F. Supp. 1356 (W.D. Mo. 1984), *appeal dismissed*, 473 U.S. 922 (1985). This case resulted in a judgment permanently enjoining the Title I (referred to as Chapter 1 in subsequent legislation) bypass as it was administered in Missouri on the premises of religiously-affiliated schools.

Letters of consent from all the parties are being filed concurrently with this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have not, and cannot, point to any appellate court decision holding contrary to *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29, *aff'd*, 417 U.S. 961 (1974), and *Meek v. Pittenger*, 421 U.S. 349 (1975), which prohibited public school teachers or counselors from providing

auxiliary services on the premises of church-operated elementary and secondary schools. Petitioners attempt to use Rule 60(b) of the Fed. R. Civ. P. as a vehicle for rejection of Establishment Clause law followed by this and lower courts for more than 20 years. Such a procedure is inappropriate and would be unfair to those, including individual *amici* herein, who have successfully obtained injunctive relief where a more fully developed record in the other cases supports the *Marburger, Meek* and *Felton* holdings.

1. Whether or not Chapter 1 advances religion in violation of the Establishment Clause depends in part on whether it constitutes direct aid to a church-related elementary and/or secondary school.

2. When the aid provided to sectarian institutions by the government is in the form of remedial teacher or counselor services provided on sectarian school premises, such services constitute direct aid to the school advancing religion.

3. Even if the benefit that flows to sectarian elementary and/or secondary schools is earmarked for secular purposes, it still violates the Establishment Clause. This is because this Court has consistently held that in an institution in which religion is so pervasive that a substantial portion of its functions is subsumed in its religious mission, such aid has the impermissible primary effect of advancing religion.

4. This Court has clearly distinguished between direct aid to pervasively sectarian institutions and to other religiously-affiliated organizations. In the case of the former, such as church-operated elementary and secondary schools, the Court has concluded there is a "substantial" risk the aid would result in religious indoctrination. However, when the benefit goes to religiously-affiliated institutions that are not deemed to be

pervasively sectarian, such as colleges and universities, the Court refuses to presume that such benefit has the primary effect of advancing religion.

5. Whether or not an educational program delivered on the premises of a sectarian elementary or secondary school is designed to "supplement" or "supplant" the regular curriculum is not a relevant constitutional distinction in direct aid cases.

6. *Aguilar v. Felton*, 473 U.S. 402 (1985), was not a departure from prior case law, but rather the application of this Court's earlier teachings in *Marburger* and *Meek*.

7. To be certain auxiliary teachers and counselors remain religiously neutral requires the state to impose constitutionally unacceptable limitations on activities of religious organizations and engage in continuing surveillance.

8. In *Wamble v. Bell*, 598 F. Supp. 1356 (W.D. Mo. 1984), the court, with benefit of a full trial record, concluded the Chapter 1 program operated by the federal government in Missouri had resulted in excessive entanglement. That court's findings confirm the conclusions of this Court in *Marburger, Meek* and *Felton*.

9. Litigation by plaintiffs in *Holguin v. Sacred Heart School*, including one of the individual *amici* herein, demonstrates that the claimed safeguards allegedly in place in Title I do not protect against an unconstitutional administration of the program. It also confirms this Court's decision in *Felton*.

10. The *Felton* plaintiffs litigated their case on the basis of this Court's prior holdings in *Marburger* and *Meek*. The *Felton* record consisted primarily of a narrative summary

which synthesized numerous affidavits prepared on behalf of defendants and seven defense witnesses. It does not provide an appropriate record for adequate review of the issues raised.

11. Currently pending in the Fifth Circuit Court of Appeals is a case, *Helms v. Cody*, wherein the district court entered an injunction permanently enjoining state-paid special education teachers from teaching secular subjects in sectarian schools. That case, with a fully-developed record, provides a more appropriate vehicle upon which this Court may determine the issues raised by petitioners in their Rule 60(b) motion.

12. Both *Wamble v. Bell*, which permanently enjoined the Title I bypass administered in Missouri on the premises of religious schools; and *Holguin v. Sacred Heart School*, which enjoined the school district from providing live instruction under Chapter 1 to students on a sectarian school campus, have fully-developed factual records. Either of these cases would be more appropriate for Rule 60(b) motion review.

13. In the event any relief is granted to petitioners, it should be restricted to a remand without opinion for the purpose of permitting the parties to develop a full record as to the past and present administration of Title I within the New York City School District. This Court should limit its determination on a Rule 60(b) motion to the injunction issued concerning the administration of the Chapter 1 program within the New York City School District. To do otherwise would unfairly prejudice the rights of the successful plaintiffs in other cases having final judgments prohibiting public school programs from providing teaching and counseling services on the premises of church-operated elementary and secondary schools.

ARGUMENT

I. *AGUILAR v. FELTON* IS IN ACCORD WITH BOTH LONG-ESTABLISHED AND CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE.

Petitioners Agostini, et al., ask this Court not only to overturn *Aguilar v. Felton*, 473 U.S. 402 (1985), but to determine whether the Establishment Clause prohibits remedial services to eligible parochial school children in the same setting as their public school counterparts -- on the premises of the schools they attend. However, petitioners seem to have receded somewhat from the rigid position they took in their Petition for Writ of Certiorari. There they claimed that "*Aguilar* stands as a repudiation of the principle that '[n]eutrality is what is required' by the Establishment Clause, *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976) (Blackmun, J.)." Agostini Cert. Pet. at 12.

Petitioners now acknowledge that "[n]eutrality or evenhandedness may not be sufficient to save a program of government aid that directly funds or subsidizes religious activity." Agostini Brf. at 13. But they argue that "Title I does not directly fund religious activity. . . . It provides purely secular services directly to eligible school children." *Id.* at 13. Petitioners thus claim that "[t]he neutrality principle applies without question in a case like this one, in which *purely secular* services are provided directly *to students*." *Id.* at 17-18.

Whether or not Chapter 1 advances religion must, under 50 years of judicial precedent commencing with *Everson v. Board of Educ.*, 330 U.S. 1 (1947), depend in part on whether the aid is direct or indirect. This Court has invariably found direct aid to church-operated elementary and secondary

schools to violate the Establishment Clause. Petitioners seek to avoid this consequence by contending that "Title I does not directly fund religious activity" and it "[i]t provides purely secular services directly to eligible school children." Agostini Brf. at 13.

This Court, however, has consistently held that when the benefit flows to church-operated elementary and secondary schools, it matters not whether the aid finances a specific religious activity. In *Meek v. Pittenger*, 421 U.S. 349, 365-66 (1975), the Court stated that "[e]ven though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion." In *Wolman v. Walter*, 433 U.S. 229, 250 (1977), the Court discussed *Meek*, stating that "even though the loan [of educational materials] ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise."

This Court has clearly distinguished between aid to pervasively sectarian institutions and aid to other religiously-affiliated organizations, concluding that church-operated elementary and secondary schools are by their nature classified as pervasively sectarian. In *Bowen v. Kendrick*, 487 U.S. 589, 609-10 (1988), the Court stated:

> Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to *institutions that are*

"pervasively sectarian." We stated in *Hunt* that

> "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. . . ." 413 U.S., at 743 . . . . The reason for this is that there is a risk that direct government funding, even if it is designed for specific secular purposes, may nonetheless advance the pervasively sectarian institution's "religious mission." *See Grand Rapids Sch. Dist. v. Ball*, 473 U.S., at 385 . . . . Accordingly, a relevant factor in deciding whether a particular statute on its face can be said to have the improper effect of advancing religion is the determination of whether, and to what extent, the statute directs government aid to *pervasively sectarian institutions*. [Emphasis supplied.]

The Court further stated:

> Only in the context of aid to *"pervasively sectarian" institutions* have we invalidated an aid program on the grounds that there was a "substantial" risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination. . . . In contrast, when the aid is to flow to *religiously affiliated institutions that were not pervasively sectarian*, as in *Roemer*, we refused to presume that it would be used in a way that would have the primary effect of advancing religion.

Id. at 612 (emphasis supplied).

Also the fact that proof of religious indoctrination has not been offered is not dispositive. The Court stated in *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985), "[n]either their parents nor the parochial schools would have cause to complain if the effect of the publicly supported instruction were to advance the schools' sectarian mission and the public school system itself has no incentive to detect or report any specific incidence of improper state-sponsored indoctrination." *Id.* at 389.

Finally, the *Bowen* Court noted that in *Aguilar* "the Court's finding of excessive entanglement rested in large part on the undisputed fact that the elementary and secondary schools receiving aid were 'pervasively sectarian' and had '"as a substantial purpose the inculcation of religious values."' 473 U.S., at 411, 105 S. Ct., at 3237 (quoting *Nyquist*, 413 U.S., at 768 . . .); *see also* 473 U.S., at 411 . . . (expressly distinguishing *Roemer, Hunt,* and *Tilton* as cases involving aid to institutions that were not pervasively sectarian)." *Id.* at 616.

Petitioners rely on *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993), where this Court said:

> [T]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is "that of a direct subsidy to the religious school from the State."

Id. at 2468. The *Zobrest* Court was anything but ambiguous when it quoted from *Meek*, 421 U.S. 366, concerning the unconstitutionality of a direct subsidy to an elementary or secondary church-operated school, even if aimed to assist the "secular" courses of the school. The Court said:

> Substantial aid to the educational function of such

> schools, we explained, "necessarily results in aid to the sectarian school enterprise as a whole," and therefore brings about "the direct and substantial advancement of religious activity."

Id. at 2468.

In *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985), the Court rejected the distinction between courses that "supplement" and those that "supplant" the regular curriculum since there is no way to know whether the school would have offered the program without Title I support. Justice Powell recognized this in his concurring opinion in *Felton,* stating "the type of aid provided in New York by the Title I program amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require. This is not the type of 'indirect and incidental effect beneficial to [the] religious institutions' that we suggested in *Nyquist* would survive Establishment Clause scrutiny." *Felton*, 473 U.S. at 417. In *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. at 396, the Court observed that "petitioners' argument would permit the public schools gradually to take over the entire secular curriculum of the religious school . . . ." *Id.* at 396.

Petitioners argue that the aid here flows to students and not to religious schools. But in *Grand Rapids*, the Court reasoned:

> Of course, all aid to religious schools ultimately "flows to" the students, and petitioners' argument if accepted would validate all forms of nonideological aid to religious schools, including those explicitly rejected in our prior cases. . . . It follows *a fortiori* that the aid here, which includes not only instructional materials but also the provision of instructional services by teachers in the

parochial school building, "inescapably [has] the primary effect of providing a direct and substantial advancement of the sectarian enterprise."

473 U.S. at 395 (citing *Wolman*, 433 U.S. at 250).

II. THREE EXISTING JUDGMENTS BASED IN PART ON *MEEK* AND *FELTON* CONFIRM THOSE DECISIONS' HOLDINGS.

The *Felton* decision was not a departure from prior law, as suggested by petitioners. Rather, it was the application of this Court's earlier teachings in *Meek*, 421 U.S. 370, 373 (1975). As this Court noted in *Grand Rapids,* 473 U.S. at 386:

> In *Meek v. Pittenger*, 421 U.S. 349, 95 S. Ct. 1753, 44 L.Ed.2d 217 (1975), the Court invalidated a statute providing for the loan of state-paid professional staff -- including teachers -- to nonpublic schools to provide remedial and accelerated instruction, guidance counseling and testing, and other services on the premises of the nonpublic schools. Such a program, if not subjected to a "comprehensive, discriminating, and continuing state surveillance," *Lemon v. Kurtzman*, 403 U.S., at 619, 91 S. Ct., at 2114 (quoted in *Meek, supra*, 421 U.S., at 370, 95 S. Ct., at 1765), would entail an unacceptable risk that the state-sponsored instructional personnel would "advance the religious mission of the church-related schools, in which they serve." *Meek*, 421 U.S., at 370, 95 S. Ct., at 1765. Even though the teachers were paid by the State, "[t]he potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present." *Id.* at 372, 95 S. Ct., at 1766. The program in *Meek*, if not sufficiently monitored, would simply have entailed too great a risk of

state-sponsored indoctrination.

In *Meek* the Court noted that teachers were "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." 421 U.S. at 371. The *Meek* Court stated that "[t]o be certain that auxiliary teachers remain religious neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." *Id.* at 372. Title I fails to provide either the limitations or continuing surveillance.

The Secretary of Education cites two college aid cases: *Hunt v. McNair*, 413 U.S. 734 (1973); and *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976), for the proposition that "[b]efore *Aguilar*, the Court stressed that no constitutional violation exists absent an actual, rather than hypothetical, danger of entanglement . . . ." Secretary's Brf. at 22. But, as explained in *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971), decided the same day as *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court treats differently church-related institutions of higher learning and church-related elementary and secondary schools. *See also Roemer v. Board of Public Works of Maryland*, 426 U.S. at 750-51 and 751-52. Unlike elementary schools, the Court does not presume colleges and universities are pervasively sectarian.

Petitioners contend that the Court's concern about the administrative cooperation required to maintain the Title I program, infringing on interests at the heart of the Establishment Clause, was misguided in *Felton*, 473 U.S. at 413. However, a review of the guidelines, Appendix 30a-31a,

promulgated by the United States Department of Education after *Felton* demonstrates that these contacts are not incidental and obviously do not relate only to ministerial contacts between the state and religious authorities operating the religious schools. Consultation is required with the nonpublic school staff before any important decision is made by the public school officials, including determinations made concerning (1) which students will receive benefits; (2) how the students' needs will be identified; (3) what services will be offered; (4) how and where those services will be provided; and (5) how the project will be evaluated. Chapter 1 teachers and other instructional personnel are to also consult with instructional staff and to coordinate the Chapter 1 program with the regular classroom instructor. When these consultations occur within the sectarian school environment, the entanglement potential increases.

As indicated in *Walker v. San Francisco Unified Sch. Dist.*, 761 F. Supp. 1463, 1468 (9th Cir. 1995), the contacts do involve Chapter 1 teachers attending faculty meetings as well as visiting Chapter 1 students in their regular classrooms. The entanglement, both through the regular administration and resulting political divisiveness was also revealed in *Walker* at 1473 where the court acknowledged after *Felton* there was a great deal of entanglement between church and state. *Id.* at 1473. The court, after reviewing the *Felton* language concerning administrative cooperation, also acknowledged that "the court can think of no way in which Chapter 1 could be implemented without extensive coordination between the public and parochial school authorities. *Id.* at 1474.

Petitioners acknowledge that there is not now, nor has there ever been under Title I, constant on-site surveillance which *Meek* held was necessary to prevent the risk that publicly paid teachers would assist in carrying out the religious mission of

the school. What *Meek* noted would be required to avoid the risk and the Constitution demands concerned more than routine monthly on-site monitoring visits.

Petitioners dismiss the entanglement problem by contending there is no church-state entanglement when public school authorities supervise and monitor public school personnel. But that ignores a type of entanglement which is glossed over in the Secretary of Education's Brief. It noted that "the administrators of the religious schools were directed to clear the classrooms used by the public school personnel of all religious symbols." Secretary's Brf. at 30 n.11.

In *Wamble v. Bell*, 598 F. Supp. 1356 (W.D. Mo. 1984), the court dealt with the religious symbol issue. *Wamble* involved a challenge to the Chapter 1 program operated by the federal government under the bypass provision of Chapter 1. In that case the district court conducted a 23-day evidentiary hearing listening to extensive testimony from officials of the United States Department of Education, supervisors, and Title I teachers as well as superintendents and principals of Catholic and Lutheran schools. The court also received into evidence thousands of pages of deposition testimony and hundreds of exhibits. On November 28, 1984, before the decision of this Court in *Felton*, the district court permanently enjoined the challenged on-premises Title I program but *sua sponte* stayed its injunction pending this Court's disposition of *Felton*.[1]

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[1]On December 24, 1984, counsel for defendants-intervenors filed a notice to appeal to this Court under 28 U.S.C. § 1252. The caption of the case was *Ferguson v. Wamble*, No. 84-1343. The jurisdictional statement at pages 3 and 4, footnote 3, stated that "unless reversed by this Court, the court of appeal's decision in *Aguilar* and the district court's decision in this case are likely to affect Title I programs throughout the country. Thereafter the Secretary of Education also filed a Notice of Appeal captioned *Bennett v. Wamble*, No. 84-1355. Plaintiff and intervenor-

In *Wamble* the court specifically found excessive church-state entanglement. Like the program in New York, there was a requirement under the Missouri Title I program that Chapter 1 sites were to be free from religious symbols. *Wamble*, 598 F. Supp. 1363 at n.7. Nevertheless, the court in *Wamble*, 598 F. Supp. at 1364, found:

> While many BHHC [the federal government's bypass contractor] teachers have never seen a religious symbol inside a Title I classroom, religious symbols were found on some fifteen occasions mentioned in the evidence in the trial of this case. Most of the objects were promptly removed or covered, if nonremovable, upon their discovery. In one instance, however, removal occurred amid protests from the pastor and school board and after the superintendent of the Kansas City Archdiocese Schools consulted the bishop. Further, the evidence indicates that other incidents *may* have occurred -- a Title I teacher would not necessarily report the presence of a religious symbol if handled without argument at the "school level."

In discussing the excessive entanglement issue, the court concluded:

> Religion demands a spiritual identification. The obvious covering of religious symbols and removal of religious artifacts do not diminish qualitatively the spirituality of an environment otherwise pervasively

---

plaintiffs filed cross-appeals styled *Wamble v. Bennett*, No. 84-152. All the appeals were dismissed for want of jurisdiction on July 2, 1985, one day after this Court's decision in *Felton*. *See* 473 U.S. 922.

sectarian. And if the otherwise religious environment, through governmental control, is substantially altered to obtain government-funded aid, the very evil against which the Founding Fathers sought to protect has been fostered -- the church has been compromised.

Wamble, 598 F. Supp. at 1373. The court also stated:

Because we recognize that the religiously affiliated school, as a *whole*, has as a central purpose, the fostering of religion, and that the pieces comprise the whole, we recognize that state control over any substantial portion of those pieces undermines the purpose of religious instruction and denigrates the institution's ability to convey freely religious ideals within its own walls and to integrate these values with education.

Id.

This Court in *Aguilar v. Felton*, 473 U.S. 402 (1985), came to the same conclusion as the trial court in *Wamble*, stating:

The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, *the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its*

respective sphere." McCollum v. Board of Educ., 333 U.S. 203, 212, 68 S. Ct. 461, 465, 92 L.Ed.2d 649 (1948).

473 U.S. at 409-10.

Similarly, Marie Schneider, one of the plaintiffs in *Helms v. Cody* and an active Roman Catholic, testified:

> I also feel that when a religion, especially my religion, removes that symbol like a crucifix from a wall because government says that it can't be there and that church is willing to take it down; that symbol that is the essence of my faith, I'm not only injured; I am angry and I am very, very saddened because to take down that symbol off a wall at a Catholic school sends a message to the students in that school, to the faculty and to me that my faith is being compromised because government has a teacher there. . . .
>
> When we take the crucifix off the wall of a Catholic school because we want a free teacher and then government is involved excessively because I would want that crucifix to remain. I would want that church to pay for the teacher and keep the crucifix on the wall.

Helms Trial Tr. 4/12 at 19-20.

Justice O'Connor has observed that interference with the "independence of . . . [religious] institutions" is a wrong which the Establishment Clause condemns. In her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice O'Connor declared that government can run afoul of the Establishment Clause by "excessive entanglement with religious institutions, which may interfere with the

independence of the institutions, ..." *Id.* at 667-68.

In *Wamble* the court took into account the continued control of the site:

> The classrooms, while generally reserved for the exclusive *use* of the Title I teachers, are otherwise controlled by the school. Some are rooms located within larger partitioned rooms, and some are used by the school for purposes other than Title I activities when Title I classes are not being held.

Wamble, 598 F. Supp. at 1364.

The court in *Wamble* clearly understood the subtle pressures exerted within the context of sectarian schools' religious atmosphere. The court stated that "[o]n-premises teachers although technically and legally supervised by state authorities, are presumptively influenced by the environment in which they work, and this enhanced opportunity for influence requires greater supervision." *Wamble*, 498 F. Supp. at 1372. The court also observed that "federal monitoring often *excludes* inquiries about religious neutrality." *Id.* at 1363. The court noted:

> In this case, the nature of the aid is on-premise remedial instruction by government subsidized teachers. Government subsidization of Title I instruction in Missouri is unlike any other form of government controlled aid because it directly involves teachers placed on the premises of the pervasively sectarian environment. First, teachers are peculiarly susceptible to influence by their environment. *Wolman v. Walter*, 433 U.S. at 247, 97 S.Ct. at 2605. Second, unlike the diagnosticians discussed in *Wolman*, teachers are afforded a unique

opportunity to form substantial and enduring relationships with students and to transmit ideological views. *Id.* Third, a teacher's handling of a subject is unpredictable. Because instruction, unlike the content of a textbook, inherently varies from teacher to teacher. In content and emphasis, there is great potential for involving in that content some aspect of faith or morals. *Lemon v. Kurtzman*, 403 U.S. at 617, 91 S.Ct. at 2113.

Because this is so, the task of this court is to ascertain whether, without excessive entanglement, the "state [can] be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion" when placed on the premises of pervasively sectarian institutions, albeit in rooms largely devoid of religious symbols. *Meek v. Pittenger*, 421 U.S. 370-71. Because it is required that the state be "certain," it cannot place reliance "on the subjective good faith and professionalism of sectarian teachers." *Id.* at 369. . . . Thus, the state becomes obliged to perform a nearly impossible task, the task of reviewing both the content and the total environment of instruction to determine that whatever is transmitted adheres to the restrictions imposed by the statute and by the Constitution. *Meek* and *Wolman* indicate that the supervision, while it is by government-paid authorities over government-paid supervised teachers, is not sufficiently distinct from the continuing surveillance required over religiously controlled teachers, *unless the facilities themselves are religiously neutral*. *Wolman v. Walter*, 433 U.S. at 247; *Meek v. Pittenger*, 421 U.S. at 371-72. Influence on a therapist's behavior can be exerted either by the fact that he serves a sectarian administrator or the fact that he operates under the pervasive atmosphere of a religious institution. The danger arises from the nature of the institution, not the

nature of the pupils. *Wolman v. Walter*, 433 U.S. at 247-48.

Id. at 1371.

Religious atmosphere is difficult to define, but acknowledged to exist. However, a Catholic educator described it well:

> Frequently enough when one speaks about distinctive qualities of the Catholic school, the word "atmosphere" comes up. The school has some sort of intangible thing called atmosphere. It comes not from the physical facilities, or the religion classes, or the students -- at least not chiefly. It comes, for good or for bad, from the faculty. The most distinctive and valuable thing the Catholic school can offer to its parents is its faculty -- even more important than the religion classes themselves or the totality of the curriculum. . . .
>
> When the student comes into the Catholic school, he somehow becomes involved in the faculty's own Christian community life. Just as a child, for good or for bad, gets caught up in the life of the family to which he pays an extended visit, so the student is influenced by the faculty's Christian community life. The atmosphere of the Catholic school, no less real because it is intangible is that spirit created by the common Christian life conscientiously lived by the faculty and participated in by the students.

Leibrecht, *Thoughts on the Catholic School*, The Catholic Educator, 27 (May, 1966). The "atmosphere" is precisely the problem, and the Court in *Meek* and *Wolman* was more than justified in expressing concern about the resulting potential for

subtle pressures being exerted upon teachers of common religious faith as that of the sponsoring church.

As indicated by the court of appeals, though most Chapter 1 teachers teaching in religious schools in New York are not of the same faith as the schools in which they teach, many are. Here there is a particularly high risk of at least the unwitting inculcation or reinforcement of the religious beliefs espoused and taught by the parochial school.

There is no reason to believe Chapter 1 teachers providing remedial educational services within the school facility would escape its pervasively religious atmosphere. This Court understood this when it stated: "The aid is provided in a pervasively sectarian environment." *Felton*, 473 U.S. at 413.

Justice Powell, certainly no ideologue and a justice familiar with education at the local level, understood this. He explained that in accordance with this Court's earlier teachings in *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971), and *Meek v. Pittenger*, 421 U.S. 349, 371 (1975), "[t]he State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion." He explained: "This is true whether the subsidized teachers are religious school teachers, as in *Lemon*, or public school teachers teaching secular subjects to parochial school children at the parochial schools." 473 U.S. at 415-16 (Powell, J., concurring).

The court in *Wamble*, referring to the decision of the court of appeals in *Felton*, 739 F.2d 48 (1984), observed that taxpayers interested in the preservation of the Establishment Clause could not be expected to mount a perpetual guard and that the court "has been wise in relying upon its reasoned apprehension of potentials rather than sanctioning case-by-case determination of the precise level of risk of fostering religion,

since such an empirical approach would inevitably lead to increased litigation in an area where some degree of certainty is needed to prevent constant controversy. . . ." *Id.* at 1367 n.11. The *Wamble* court dismissed the defendants' contention that such a view was "an absolutist" approach, stating:

> In response, this court notes first, that it is a holding based on its finding that the Title I rooms are not truly religiously neutral, a finding supported by numerous incidents wherein religious symbols were found in these rooms and by facts which indicate that the on-premise Title I rooms are in most instances physically and educationally identified with the parochial institution.

Id. at 1371-72 n.13.

Should this Court rule that it is constitutionally permissible for public school teachers to teach within parochial school facilities, the decision may well impact on the interests of *amici* Mary L. Helms, Amy T. Helms, and Marie L. Schneider who are also plaintiffs in *Helms v. Cody*, 856 F. Supp. 1102 (E.D. La. 1994), *appeal docketed sub nom Helms v. Picard*, No. 97-30231 (5th Cir. Mar. 17, 1997). As stated in the Brief for the Secretary of Education at 49 n.17: In *Helms* "a district court invalidated Louisiana's special education statute, insofar as it allowed state-paid teachers to teach inside pervasively sectarian schools. *Id.* at 1121-22." His decision was based on numerous factual findings. 856 F. Supp. at 1106-1122.

In the real world where thousands of school districts function on a daily basis, we know that Chapter 1 abuses abound. One such example caused *amicus* Darla Fernandez and other Catholic parents who sent their children to a Catholic school in Hollister, California, to file a lawsuit

concerning the maladministration of the Chapter 1 program. What happened in Hollister demonstrates why constant surveillance would be required when Title I services are delivered on the premises of sectarian schools.

The Hollister School District delegated the implementation of part of its Chapter 1 program to the principal of Sacred Heart School. Appendix at 3a. The result was excessive entanglement and a symbolic union of church and state. It also underscores the aid flows to the school. *Holguin v. Sacred Heart School*, No. C 90 20056 JW (N.D. Ca. 1993)

During the time in question there were three Chapter 1 aides at Sacred Heart: Barbara Sandles, Barbara Curry, and Tammy Ramirez. Barbara Sandles wanted to work at Sacred Heart as an aide because her children were enrolled there. Though nothing was available at the school, the principal told her the Chapter 1 aide would be employed by the school district. Pursuant to the principal's suggestion, Mrs. Sandles applied to the school district and within a week was hired to work at Sacred Heart. *Id.* at 7a.

Before Tammy Ramirez was employed by the school district as a Chapter 1 aide at Sacred Heart, she was the eighth grade home room mother at Sacred Heart. Barbara Curry, likewise, had children enrolled at Sacred Heart. *Id.* at 7a.

Before being employed as a Chapter 1 aide, Curry performed volunteer work at Sacred Heart working with her youngest daughter's second grade class. She was subsequently hired by Sacred Heart as the first grade aide on a one-to-one basis with the children. For instance, she assisted them to read and work with educational tools. She testified, "I think the last two years we actually went into the Chapter 1 program under Sister Margaret Ann." *Id.* at 12a.

During the 1985-86 school year and before the Chapter 1 program was moved from the school building itself to the pastoral center located on the campus of Sacred Heart, the principal had Ms. Curry select materials to order for the Chapter 1 program. Later both Curry and Sandles selected supplies to be ordered for the Chapter 1 program based upon the suggestions of the principal. *Id.* at 13a, 19a.

Curry first learned of Chapter 1 from the principal who suggested she become involved as a Chapter 1 aide. Curry testified she received all her direction and supervision from the Sacred Heart principal and considered the principal to be her "boss." In fact, Curry testified everything was done first through the principal. It was the principal who gave instruction to the Chapter 1 aides as to how much time they were to work weekly and they were then paid on an hourly basis. Curry testified that the principal would "correct us on certain things." She further testified that the principal would say "don't do this" or "try that." Curry received her paycheck from the principal of Sacred Heart and Curry and Sandles were required to sign in and out when coming to and from school each day on a sheet maintained in the principal's office. Either Curry or Sandles would pick up the key to the Chapter 1 room each day at that office. *Id.* at 13a-14a.

Curry received no advice nor instruction from the school district as to how to conduct the Chapter 1 program. Although she went to the district offices from time to time, this was only to deliver papers from the principal. Even then, she did not know what their content was. Curry did not meet with school district personnel to receive instructions or suggestions concerning the Chapter 1 program since "[m]ost of 'their' instructions came from sister." Further, the school district personnel in charge of the Chapter 1 program did not make regular visits to monitor the program. *Id.* at 14a, 19a.

The principal of Sacred Heart made repeated surprise visits to the Chapter 1 classroom where she observed the students and the teaching. According to Curry, when the principal came to the classroom she was there to see what they were doing and "to check" their work. The pastor at Sacred Heart also would visit the Chapter 1 room. *Id.*

Curry and Sandles ate lunch at the Sacred Heart lunchroom with the other private school teachers, and Curry attended the mass held for the Sacred Heart students during the school day. Curry also attended faculty meetings as an aide. *Id.*

Curry did not keep attendance records but let the classroom teachers at Sacred Heart keep the records of the Chapter 1 students. There were also occasions when the principal would request student records and would take the records from the Chapter 1 room to her office. *Id.* at 15a.

Parents of Chapter 1 students were permitted to visit the Chapter 1 room. However, the parents were required to sign in at the principal's office. *Id.* at 15a.

Some of Sacred Heart students received all of their mathematics instruction in Chapter 1 and did not receive any math training from the Sacred Heart math teacher. *Id.*

Curry did not have parent-teacher conferences and never met with parents. All contacts with parents went through the principal. When Curry was asked about what opportunities she had to find out from the parents how they might be involved in the Chapter 1 program, she testified: "It wasn't our duty to face the parents. We were aides. Sister handled all duties like that." *Id.*

Barbara Curry attended in-service training in Monterey with

the other regular classroom teachers employed by Sacred Heart. *Id.*

In November, 1987, when Joann Rianda, one of the plaintiffs in the *Holguin* case, confronted Sandles, Sandles claimed she and Curry were aides for Sacred Heart School. Sandles said they were taking the children to a classroom for enrichment because "Sister Lois cannot handle all the children in the classroom at one time." *Id.* at 3a.

In 1988 an attempt to ascertain whether her daughter had been in a Chapter 1 remedial program, Rianda went to the person in charge of the school district's Chapter 1 program and asked whether her daughter was in Chapter 1. She was told, however, she should talk with the Sacred Heart principal because it was her program. *Id.* at 3a.

The Sacred Heart School Parent/Student Guidelines shows both Barbara Curry and Barbara Sandles as part of the school faculty. It also shows that Chapter 1 and 2 are listed in the curriculum along with other courses. *Id.* at 27a, 29a.

The principal met with the Chapter 1 aides almost every day. In fact, Sandles often asked the principal for suggestions as to how to teach. *Id.* at 6a.

From time to time the Chapter 1 aides would worship with the faculty at Sacred Heart and would even attend masses held for the students. *Id.* at 6a.

Sandles acknowledged that Tamara Rianda, one of the plaintiffs and students at Sacred Heart, was very bright and when her mother inquired why Tamara needed remedial help, Sandles was following the direction of the regular teacher at Sacred Heart. When Rianda asked why Sandles had not

informed the teacher that Tamara was not entitled to Chapter 1 services, Sandles responded "[b]ecause she was one of the students that was on the list . . . [and] it wasn't my position to question it." *Id.* at 7a.

Not only did the Chapter 1 aides hold themselves out as part of the Sacred Heart staff and program, but they actively implemented school policy such as the dress code. The principal had complete access to the Chapter 1 room and records and exercised control over those records. *Id.* at 8a.

The Hollister School District deferred to the principal with regard to access to the records and looked to her as a person directing the program. *Id.* at 8a.

The *Holguin* plaintiffs notified their congressmen and the California State Department of Education. After a two-day administrative investigation in May of 1989, the California State Department of Education concluded:

> The district, is cautioned that information given to the investigation team suggests strongly that the administration of the ECIA Chapter 1 program at Sacred Heart Elementary School has been delegated largely to the school site administration. Pursuant to the provision of Aguilar v. Felton, as well as long standing statutes, the administration of the program which includes the planning, on-going implementation, evaluation of program and staff, and parent activities, are district responsibilities and must differ from the delegation given to public school site administration.

Id. at 8a-9a.

After Barbara Holguin and the other plaintiffs in that action,

including Darla Fernandez, notified their congressman and the state department of education that their children had been improperly and without their consent removed from the regular classroom and placed from time to time in the Chapter 1 program, Genine Holguin, one of the plaintiffs and a student at Sacred Heart, was expelled. This resulted in emotional injury to Genine requiring professional treatment.

Petitioners claim the Chapter 1 program is devoid of excessive entanglement. Darla Fernandez and the other plaintiffs in *Holguin* would say otherwise. In order to prevent a violation of the Constitution, they found it necessary to sue not only the school district but also their own church. There are hundreds of Hollisters, and the problems and lawsuits will multiply if this Court reverses *Felton* and turns its back on its earlier Establishment Clause jurisprudence. But Darla Fernandez worries what will happen if the judicial precedent upon which her consent judgment (*see* Appendix 20a-24a) was made is nullified by this Court.

III. THIS COURT SHOULD NOT PERMIT A RULE 60(b) MOTION TO BE USED IN THIS CASE AS THE VEHICLE TO AFFECT A MAJOR CHANGE IN ESTABLISHMENT CLAUSE JURISPRUDENCE.

Plaintiffs litigated this case on the basis of this Court's prior holdings in *Marburger* and *Meek* that, as a matter of law, the Establishment Clause prohibits the sending of public school teachers and counselors into religious schools. For that reason, they chose to proceed to summary judgment primarily on a record developed in the earlier case of *National Coalition for Public Educ. & Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D. N.Y. 1980). *See Felton v. Secretary*, 739 F.2d 48, 52 (2d Cir. 1984).

The *Harris* record consisted primarily of a narrative summary which synthesized numerous affidavits prepared on behalf of defendants and seven witnesses called by defendants. The *Harris* plaintiffs called only one witness who was the Executive Deputy Commission for Education Programs in the U.S. Office of Education. He was asked only a series of primarily hypothetical questions. Plaintiffs' counsel in *Harris* based his case on legal, rather than factual, arguments in part because "the financing the trial record is beyond our means." *Harris*, 489 F. Supp. at 1252.

However, plaintiffs' in *Wamble*, *Holguin*, and *Helms* (two of which involved Title I and the other a similar state program) elected not to rely only on *Marburger* and *Meek* but to also develop a full record setting forth the abuses in the programs, including instances of excessive entanglement. The trial courts in *Wamble* and *Helms* have rendered opinions and issued judgments based not only on the law, but on the factual record developed at great expense by the parties.

In *Wamble* the main defendant was the Secretary of the U.S. Department of Education. The Department of Education, through a contractor, administered Title I to private school students in Missouri under the "bypass" provision of. The Secretary could have filed a Rule 60(b) motion in *Wamble*. Likewise, the local school district in Hollister, California, could file a Rule 60(b) motion in *Holguin* where there is a consent judgment enjoining an on-premises Title I program.

Also, there is a fully developed record in *Helms*, a case in which the court found unconstitutional an on-premises special education program operating under state law. The school district has filed an appeal. This case also provides a vehicle to determine whether *Marburger, Meek* and *Felton* represent the current state of the law as to the constitutionality of public

school teachers providing teaching services on the premises of sectarian schools.

It would be grossly unfair to the successful plaintiffs in *Wamble*, *Holguin*, and *Helms* for this Court to reverse more than 20 years of established judicial precedent without a full record when these other cases are as readily available.

CONCLUSION

This Court should not overrule its decision in *Aguilar v. Felton* and should decline to provide relief to petitioners under Rule 60(b) of the Fed. R. Civ. P. If any relief, however, is provided, it should be restricted to remanding the case so that the parties may develop a full record of the past and present administration of New York City's Chapter 1 program.

Dated: March 28, 1997 Respectfully submitted,

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APPENDIX

APPENDIX A

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action N0. C 90 20056 JW

BARBARA HOLGUIN, et al.,

Plaintiffs,

v.

SACRED HEART SCHOOL, et al.,

Defendants.

Date: October 30, 1992 Time: 9:00 A.M.
Courtroom: 1 Judge: Hon. James Ware

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO CHURCH DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

* * * * * * *

Apparently, on January 17, 1986, there was a discussion between Lorraine Garcy of the Hollister School District and Sister Margaret Ann to implement their plans for solving the Chapter 1 problem at Sacred Heart (*see* Ex. 25 January 17, 1986 letter from Garcy to Sister Margaret Ann).

On April 21, 1986, Garcy of the school district wrote to Wade Brynelson of the State Department of Education advising him that on April 8 "the Monterey Diocese represented by Agnes Leonardich, and Joseph P. McElligott, rescinded their complaint against the Hollister School District." (Ex. 5-Leonardich Dep. at 58-59; *see also* Ex. 26). The letter spoke of a plan to provide services, stating that it would be at a neutral site leased by the Hollister School District but failed to mention the fact that the lease was with the diocese and the location was in the Pastoral Center on the church premises (Ex. 5-Leonardich Dep. at 58-61).

Although defendants contend that Sacred Heart School was not involved in the operation of the Chapter 1 program and that it was supervised from the school district offices, nevertheless on May 30, 1986, Mary Guerrero, Hollister School District Director of Curriculum Development and Special Programs, wrote to the California State Department of Education that "Sacred Heart School is the one nonpublic school which indicated an interest in participating in the Chapter 1 program. We have not yet received *their* program description. However, we will *forward* it to you as soon as we receive it." (*See* Ex. 27 (emphasis supplied).)

On June 24, 1986, a lease agreement was entered into between the Hollister School District and the Diocese of Monterey Education and Welfare Corporation for the leasing of a room in the Pastoral Center for Chapter 1 (*see* Ex. 28).

Under federal law, Chapter 1 is a remedial educational service offered to educationally deprived students. Notice to and consultation with Chapter 1 parents are required. At Sacred Heart School, however, the children of plaintiff parents were placed in the Chapter 1 program without notice to or with the knowledge of these parents (*see* Holguin Declaration at paras. 6-16; *see also* Ex. 4-Doyle Dep. at 18, 19, 43-44, 46, 59-60, 65-83, 94; Ex. 9-Rianda Dep. at 28-34, 49-66, 69-72, 121-36, 159-62; Exs. 38, 40, 41, 42, 48 at 2-6).

There is substantial evidence to support the plaintiffs' contention that although Chapter 1 requires a program for nonpublic school students to be implemented by a public agency and not by a sectarian school, the Hollister School District delegated the implementation of a portion of the district's Chapter 1 program to the principal of Sacred Heart. In November of 1987 when plaintiff Joann Rianda confronted Chapter 1 aide Barbara Sandles, Sandles indicated that she and Chapter 1 aide Barbara Curry "were aides for Sacred Heart School." (Ex. 9-Rianda Dep. at 28-31). Sandles informed Rianda that they were merely taking the children to a classroom for enrichment because "Sister Lois cannot handle all the children in the classroom at one time." (*Id.* at 31).

In 1988 in an attempt to ascertain whether her daughter had been in a Chapter 1 remedial program, Rianda was informed by Joya Chatterjee, the person in charge of the school district's Chapter 1, that "you should really speak to Sister Margaret Ann about this, because it's her program." (*Id.* at 124). And clearly it was.

On February 24, 1987, Mary Guerrero of the school district wrote to Sister Margaret Ann enclosing copies of purchase orders which Sister had sent to the school district for Chapter 1 and Chapter 2 materials which Sister Margaret Ann had requested. According to Guerrero, a processing procedure had been established by the school district for future purchase order requests by Sister Margaret Ann (*see* Ex. 29). Numerous items were purchases for Chapter 1 at the request of Sister Margaret Ann (*see* Ex. 30; Ex. 1-Brynelson Dep. at 57-59; Ex. 5-Leonardich Dep. at 136-37).

On February 29, 1988, Ed Leonard of the Hollister School District, wrote in a memo:

> The aide time for 1988-89 can be readjusted in August when a rough estimate of your actual dollar amount is received. *You may need to hire for fewer hours next year.*

(*See* Ex. 32). On March 3, 1988, Leonard wrote to Sister Margaret Ann:

> It occurs to me that your February vouchers indicate 5-3/4 hours for most days for hours worked by the Chapter 1 aides. The work-up prepared by Florence Martinez is for 5 hours per day per aide. I suggest that the aides only report 5 hours through June. *If you do that, you will save the Chapter 2 funds for carry-over to next year.*
>
> The additional 3/4 hours per day per aide is not going to leave you a carry-over.
>
> *Please let me know how I can help if this is not easy for you to implement.* I understand that the aides work more than 5-3/4 hours presently. Can we get them to report a maximum of 5 hours per day?

(*See* Ex. 32 (emphasis supplied)).

Sister Margaret Ann attempted to explain this memorandum (Ex. 8-Reardon Dep. II at 115-18). She testified:

> Mr. Leonard asked me to advise the two Chapter 1 aides, Barbara Curry and Barbara Sandles, that their time should be cut down . . . because we were out of funds.

(*Id.* at 117).

On April 28, 1988, Leonard wrote to Sister Margaret Ann:

> On the above date you have $1,18.00 remaining for Chapter 1 aide funding. At four hours per day, *you can pay for 21 days in May.*

(Ex. 34 (emphasis supplied)).

The Sacred Heart School Parent/Student Guidelines shows both Barbara Curry and Barbara Sandles as part of the school faculty (Ex. 35; Ex. 8-Reardon Dep. II at 92).

When Mrs. Holguin was attempting to find out whether her children were or were not in a Chapter 1 program, Joya Chatterjee wrote to Mrs. Holguin:

> Chapter 1 is a program for students who fall below the 25% percentile. Extra help is given to these students to achieve better in class. Sacred Heart has an approved curriculum by the state. Hollister School District *is fiscally responsible for the program and provides guidance for the academic portion.* If you should have concerns regarding the program, *please contact Sister Margaret Ann.* I'm sure she will be mose pleased to discuss the Chapter 1 program with you.

(Ex. 37 at 2 (emphasis supplied)).

Joya Chatterjee in an October 20, 1988, memo to Sister Margaret Ann reminded the Sacred Heart School principal that the school district needed "a school plan with goals and objectives." The memorandum further stated:

> The plan *should state how the school plans to use the Chapter 1 dollars,* what are the objectives for the students, and what activities will take place so that the students will achieve.

(Ex. 39 (emphasis supplied)).

On April 10, 1989, Joya Chatterjee wrote Sister Margaret Ann responding to a request for Chapter 1 program information informing Sister Margaret Ann that the Chapter 1 program "provides additional aide time to the school." (Ex. 44). The Chapter 1 plan submitted by Sister Margaret Ann clearly contemplated a Chapter 1 program operated by Sacred Heart—not the school district (*see* Ex. 47).

Under a hearing "Support Areas" (numbered page 594), the following statement appears in Sacred Heart's Chapter 1 plan:

> Sacred Heart School will support the following:

1) All reading teacher [sic] on the faculty will coordinate programs and resources for aides.

2) Sacred Heart School will inform parents on a regular basis through progress reports, parent information closures and by distribution of current educational literature.

At the end of the 1988-89 school year the Hollister School District had Sister Margaret Ann perform the supervisory evaluation of Chapter 1 aide Barbara Sandles (*see* Ex. 8-Reardon Dep. II at 59-65, 67-71, 74-77; Ex. 5-Leonardich Dep. at 78-80; Ex. 46).[3]

Although attempting to deny Sacred Heart's involvement in the chapter 1 program, clearly the Chapter 1 aides paid by federal dollars were an integral part of the Sacred Heart curriculum. The principal met with the Chapter 1 aides almost every day. In fact, Barbara Sandles often asked the principal for suggestions as to how to teach (Ex. 8-Reardon Dep. II at 64-65). The Chapter 1 aides attended Sacred Heart's faculty meetings several times yearly (*id.* at 65-66). Sandles had regular meetings with the Sacred Heart teachers (*id.* at 67) and ate at the Sacred Heart lunchroom (*id.* at 77).

From time-to-time the Chapter 1 aides would worship with the faculty at Sacred Heart (*id.* at 73-74) and would even attend Masses held for the students (*id.* at 98; *see also* Ex. 10-Sandles Dep. at 124). Strangely, according to Sandles, she did not even report to the school district at all during the first year she was employed as a Chapter 1 aide. Her contact with the supervisory personnel at the school district did not commence until Joya Chatterjee became her supervisor (Ex. 10-Sandles Dep. at 75).

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[3] The veracity of Joya Chatterjee is in substantial question in light of her incredible testimony concerning this evaluation form which she first suggested was prepared by another individual at her request. (*See* Ex. 2-Chatterjee Dep. at 101-12, 114-17).

Sandles' testimony as to the nature of the program is confusing. First, she testified that the Chapter 1 program during the 1987-88 school year was not a remedial program (Ex. 10-Sandles Dep. at 33), but later she stated that it was (*id.* at 34). However, she said that the students in the Chapter 1 program "seemed to excell." (*Id.* at 35). She acknowledged that plaintiff Tamara Rianda was very bright and when asked why Tamara needed remedial help, Sandles stated that she was going by the direction of the regular classroom teacher at Sacred Heart (*id.* at 35-37, 38-39). When asked why she didn't indicate that Tamara was not entitled to Chapter 1 services in light of her intelligence, Sandles responded "[b]ecause she was one of the students that was on the list . . . [a]nd it wasn't my position to question it." (*Id.* at 39).

During the time in question, there were three Chapter 1 aides at Sacred Heart: Barbara Sandles, Barbara Curry, and Tammy Ramirez (Ex. 8-Reardon Dep. II at 66-67, 72-74; Ex. 36 at 5, 16, 19; Ex. 10-Sandles Dep. at 61-62). When Barbara Sandles moved to Hollister, she contacted Sacred Heart for an aide position because she had enrolled her children in Sacred Heart (Ex. 10-Sandles Dep. at 90-91). Sister Margaret Ann told Sandles that she did not have anything available but that there was going to be a need for another Chapter 1 aide at Sacred Heart employed by the Hollister School District, and Sister Margaret Ann sent her to the school district to apply for the position (*id.* at 91-92, 95-96). Within the week Sandles was hired to work at Sacred Heart (*id.* at 97-99). Perhaps not coincidentally, Barbara Sandles' husband also served on the Sacred Heart School Board (*id.* at 62-63).

Before Tammy Ramirez became a school district employed Chapter 1 aide at Sacred Heart, she was the 8th grade homeroom mother at Sacred Heart during the 1987-88 school year (*see* ex. 36 at i; Ex. 8-Reardon Dep. II at 72-73).

Chapter 1 is required to supplement, rather than supplant, services offered in the school program. However, at least in the kindergarten program, the Chapter 1 services at Sacred Heart School did supplant the schools' math teaching (Ex. 4-Doyle Dep. at 79-80). There is evidence that the program was being operated as a federally-funded assistance to the school because the teacher could not handle the class, rather than as a supplemental program for the students (Ex. 9-Rianda Dep. at 31-32).

Not only did the Chapter 1 aides hold themselves out as part of the Sacred Heart School staff and program (*id.*), but they actively implemented school policies such as the dress code (*id.*), but they actively implemented school policies such as the dress code (*id.* at 43-44) and participated at the school as part of the faculty (*id.*). Sister Margaret Ann Reardon, the principal of Sacred Heart School, actively supervised the Chapter 1 aides (*id.*), had complete access to the Chapter 1 room and records (*id.* at 53-54; Ex. 4-Doyle Dep. at 70-72), and exercised control over the records (Ex. 9-Rianda Dep. at 58-59).

The Hollister School District deferred to Sister Margaret Ann with regard to access to the records (*id.*) and looked to her as the person directing the program. Sister Margaret Ann is the individual the district referred parents to if they had questions about the Chapter 1 program (*id.* at 124; Ex. 4-Doyle Dep. at 94). After a two-day administrative investigation in May of 1989, the California State Department of Education concluded:

> The district, is cautioned that information given to the investigation team suggests strongly that the administration of the ECIA Chapter 1 program at Sacred Heart Elementary School has been delegated largely to the [church] school site administration. Pursuant to the provision of Aguilar vs. Felton, as well as long standing statutes, the administration of the program which includes the planning, on-going implementation, evaluation of program and staff, and parent activities are dis-

> trict responsibilities and must differ from the delegation given to public school site administration.

(Ex. 48 at 19; *see also* Ex. 1-Brynelson Dep. at 21-25).

Although in her deposition, Chapter 1 aide Barbara Sandles maintained that Sister Margaret Ann did not come into the Chapter 1 room, the investigation by the California State Department of Education indicated that Sister Margaret Ann was in fact in and out of the building an average if three times daily and did walk-through supervision at least five times a week (Ex. 3-DeLane Dep. at 53).

Clearly it was Sacred Heart School that determined how its Chapter 1 program would be operated. Hollister School District was little more than a go-between relaying information between the church school and the state.

* * * * * * *

APPENDIX B

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action N0. C 90 20056 JW

BARBARA HOLGUIN, et al.,

Plaintiffs,

v.

SACRED HEART SCHOOL, et al.,

Defendants.

Date: December 11, 1992 Time: 9:00 A.M.
Judge: Honorable James Ware

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO CHURCH DEFENDANTS' AND FEDERAL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Louis Leone, counsel for the school district and other defendants, wrote to the undersigned on February 18, 1992, acknowledging receipt of a Notice of Taking Deposition which included the notice for defendant Barbara Curry. He

indicated he would attempt to identify certain current school district employees or others who would have relevant information. Subsequently, Mr. Leone advised counsel for plaintiffs that he had not been able to produce Barbara Curry and had also been unable to contact her.

In September, 1992, plaintiffs again noticed the deposition of Barbara Curry and had a subpoena issued. On October 1 Mr. Leone wrote counsel for plaintiffs indicating that he was unable to produce Barbara Curry for her deposition. The subpoena was served, and thereafter Curry's daughter telephoned counsel for plaintiffs and advised that her mother had been served a deposition subpoena but had a penalty airline ticket to visit her mother in Chicago during the time the deposition to be taken. Counsel advised Barbara Curry's daughter to contact Louis Leone. Thereafter, Mr. Leone scheduled the deposition of Barbara Curry for October 29, 1992. The deposition was taken on October 29 in Fallbrook, California.

Both the federal and church defendants have filed motions for summary judgment. Both sets of defendants have also served statements of material facts which they claim are not in dispute. The federal defendants, for instance, contend that (a) services under Chapter 1 must actually be provided either by employees of a public agency or by a contractor; (b) Chapter 1 funds must be used to provide services that supplement and in no case supplant the level of services that would in the absence of Chapter 1 be available to participating children in private schools; (c) Chapter 1 funds may not be used for the needs of any private school or any the general needs of the children in private school.

In their statement of undisputed material facts, church defendants allege that (a) the content of the Chapter 1 program is determined solely by the school district personnel; (b) Chapter 1 teaching materials are selected solely by school district personnel; (c) Chapter 1 materials are purchased solely by the school district; (d) Chapter 1 personnel did not participate in Sacred Heart educational activities; (e)

the hiring and firing of Chapter 1 personnel was done solely by school district personnel; (f) assignments of Chapter 1 personnel were made solely by school district personnel; (g) training of Chapter 1 personnel was done solely by school district personnel; (h) Chapter 1 personnel were supervised solely by school district personnel; (i) Chapter 1 personnel reported solely to the school district; (j) the performance of Chapter 1 personnel was formally evaluated only by school district personnel; (k) Chapter 1 personnel are paid solely by the school district; (l) all decisions regarding the allocation of Chapter 1 funds were made solely by school district personnel.

Because of plaintiffs' counsel's inability to take the deposition of Barbara Curry, as detailed above, the information she provided at her deposition was not in the possession of plaintiffs' counsel at the time plaintiffs' previous opposition papers were prepared and filed. Counsel has only recently received the transcript of Curry's testimony.

Defendant Barbara Curry testified in direct conflict with the deposition testimony of Sister Margaret Ann Reardon, principal of Sacred Heart School, and Barbara Sandles, a Chapter 1 aide, who worked with Barbara Curry at Sacred Heart. Curry's testimony also is in direct conflict with all or most of the above-referred to statements of undisputed material facts propounded by either the federal or church defendants. Barbara Curry testified as follows relative to her involvement in the Chapter 1 program at Sacred Heart:

1. She had children enrolled in Sacred Heart School (Curry Dep. at 10-11). At that time she performed volunteer work at Sacred Heart working in her youngest daughter's second grade classroom (*id.* at 11). She was subsequently hired by Sister Margaret Ann (*id.* at 12-13). As an employee of Sacred Heart, she worked as a first grade aide working on a one-to-one basis with the children, for instance, assisting them to read and working with educational tools such as flashcards (*id.* at 14-15). She was working several hours per week at Sacred Heart on an hourly basis (*id.* at 15).

2. She worked at Sacred Heart approximately five years and stated "I think the last two years we actually went into the Chapter 1 program under Sister Margaret Ann." (*Id.* at 16). The last year she worked at Sacred Heart was during the 1987-88 school year (*id.* at 17).

3. During the 1985-86 school year and before the Chapter 1 program was held at the Pastoral Center on the campus of Sacred Heart, Sister Margaret Ann had Curry select materials to order for the Chapter 1 program (*id.* at 25). Later, both Curry and Barbara Sandles, another Chapter 1 aide, selected supplies to be ordered for the Chapter 1 program based upon the suggestions of Sister Margaret Ann. The materials were ordered by catalogs furnished by Sister Margaret Ann (*id.* at 25-30).

4. She first learned of the Chapter 1 position from Sister Margaret Ann who suggested that she become involved as a Chapter 1 aide (*id.* at 18-19). It was Sister Margaret Ann who advised Curry of the nature of the program and the fact that it would be conducted in the old dining room of the convent (*id.* at 19).

5. Curry first met Barbara Sandles, the other Chapter 1 aide, when Sister Margaret Ann introduced them. Sandles' children were also enrolled in Sacred Heart (*id.* at 68).

6. Curry received all her direction and supervision from Sister Margaret Ann and considered the Sacred Heart Principal to be her "boss." (*Id.* at 37, 38, 50, 93). In fact, Curry testified that "everything was done first through Sister Margaret Ann, anything we did we always went to her first. She was the quote, unquote, boss. . . ." (*Id.* at 41). It was Sister Margaret Ann who gave instructions to the Chapter 1 aides as to how much time they were to work weekly and they were then paid on an hourly basis (*id.* at 38, 51-52). Curry testified that Sister Margaret Ann would "correct us on certain things." She further testified that Sister Margaret Ann would say "don't do this" or "try that." (*Id.* at 56).

7. Barbara Curry's opinion was not sought as to where the Chapter 1 program should be conducted because that was somehting that was between the school district and Sister Margaret Ann (*id.* at 64).

8. Curry received her paycheck from Sister Margaret Ann (*id.* at 37-38).

9. Curry and Sandles were required to sign in and out when coming to and leaving school each day on a sheet maintained at Sister Margaret Ann's office (*id.* at 38-39).

10. Either Curry or Sandles would pick up the key to the Chapter 1 room each day at Sister Margaret Ann's office (*id.* at 39).

11. Curry received no advice nor instruction from the school district whatsoever as to how to set up or conduct the Chapter 1 program (*id.* at 86). She went to the school district offices, only to deliver papers from Sister Margaret Ann. Even then, she did not know what was contained in the papers (*id.* at 47-48, 77). According to Curry, she did not meet with school district personnel to receive instructions or suggestions concerning the Chapter 1 program since "[m]ost of [their] instructions came from Sister." (*Id.* at 48-49). Further, the school district personnel in charge of the Chapter 1 program did not make regular visits to monitor the program at Sacred Heart (*id.* at 47-49).

12. Sister Margaret Ann would repeatedly make surprise visits to the Chapter 1 classrooms where she would observe the students and the teaching (*id.* at 52). When Sister Margaret Ann came to the Chapter 1 classroom she was there to see what they were doing and "to check [their] work." (*Id.* at 53-54).

13. The pastor at Sacred Heart would from time-to-time visit the Chapter 1 classroom (*id.* at 53).

14. Curry and Sandles ate their lunches at the Sacred Heart lunchroom with the other teachers. She attended the Mass held for the students at Sacred Heart during the school day (*id.* at 44-46). Barbara Curry also attended Sacred Heart faculty meetings as an aide (*id.* at 44).

15. She did not keep attendance records but let the regular classroom teachers keep the attendance records of the students involved in the Chapter 1 program (*id.* at 74, 75-76).

16. There were occasions when Sister Margaret Ann would request student records and would take the records to her office (*id.* at 90-91).

17. Parents of Chapter 1 students, like parents of all students enrolled at Sacred Heart, were permitted to visit the Chapter 1 room in the Pastoral Center. According to Curry, "Sister allowed it." (*Id.* at 83). However, the parents were required to "sign in" at the principal's office at Sacred Heart (*id.*).

18. Some of Sacred Heart students received **all,** not just part of their mathematics instruction, in the Chapter 1 room and did not receive **any** math training from the Sacred Heart math teacher (*id.* at 80-82).

19. Curry did not have parent-teacher conferences and never met with parents. All such contact with the parents went through Sister Margaret Ann (*id.* at 76-77, 78). When she was asked about what opportunities she had to find out from the parents as to how they might be involved in the Chapter 1 program, Curry stated: "It wasn't our duty to face the parents. We were aides. Sister handled all duties like that." (*Id.* at 78).

20. Barbara Curry attended in-service training at Monterey with other regular classroom teachers from Sacred Heart (*id.* at 89).

21. It was Sister Margaret Ann who informed her as to how much money was available for the purchase of Chapter 1 materials (*id.* at 84). Even when it came time for layoff due to lack of funds, it was Sister Margaret Ann who notified Curry of the layoff (*id.* at 70).

Clearly, insofar as the Chapter 1 program related to Sacred Heart students, the Hollister School District delegated the implementation of the program to the parochial school principal contrary to the contention of the federal and church defendants. The testimony of Barbara Curry confirms plain-

tiffs' claims that the Chapter 1 program for the students at Sacred Heart was in fact operated by Sacred Heart, and it was Sister Margaret Ann—not school district personnel—who supervised and administered the program for the Sacred Heart students.

Barbara Curry even confirmed the fact that the Chapter 1 program was not operated merely as a supplemental program, but at least in certain instances supplanted the mathematics program for some students at Sacred Heart.

The testimony of Barbara Curry confirms the fact that Sacred Heart took over both the administration and implementation of the chapter 1 program. Sacred Heart acted as a substitute for the school district. There was a de facto delegation of the school district's responsibilities in providing Chapter 1 services to Sacred Heart eligible students. Thus, there is substantial evidence that the state and school district defendants have delegated a local governmental function to Sacred Heart School and other church defendants or have otherwise intertwined with the private defendants so that acts of the church defendants in relation to the Chapter 1 program are properly treated as state action.

CONCLUSION

For the foregoing reasons and the reasons set forth in plaintiffs' previous memorandum in opposition, defendants' motions for summary judgment should be denied.

Dated: November 24, 1992

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APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CASE NO. C 90-20056 JW

BARBARA HOLGUIN, et al.,

Plaintiffs,

v.

SACRED HEART SCHOOL, et al.,

Defendants.

[Filed, Jan 11 11:54 AM '93, Richard W. Wieking, Clerk, U.S. District Court, No. Dist. of Ca. S.J.]

ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS, GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case is brought by six former students of the Sacred Heart School, a private Catholic school in Hollister, California, and their parents. The Plaintiffs seek legal and equitable relief from several governmental and church agencies and officials for alleged civil rights violations.

The Defendants have made several dispositive motions which are currently before the Court.

* * * * * * *

The Third, Fourth, and Fifth Claims all arise out of claims of excessive entanglement between the state and federal governments and the church defendants.

In the Third Claim Plaintiffs allege that providing Chapter 1 services on the Scared Heart School grounds amounted to excessive entanglement between church and state, violative of the Establishment Clause of the First Amendment, as expressly proscribed in *Felton v. Aquilar*. Plaintiffs contend that Chapter 1 classes were conducted at the Sacred Heart School's Pastoral Center. In support of this claim, Plaintiffs submit, *inter alia*, a lease agreement in which the School District leased a room in the Pastoral Center to provide Chapter 1 Services. *See* Pl. Ex. 28. The lease establishes that the School District, and the Church defendants, jointly acted and planned to provide Chapter 1 services at the Pastoral Center.

The Court finds there is a triable issue of material fact as to whether live Chapter 1 instruction was held at the Pastoral Center. As a matter of law, live lectures conducted in the pastoral center would violate the Establishment Clause.

In the Fourth Claim, Plaintiffs allege that the School District delegated its decision-making power for the operation of Chapter 1 services at Sacred Heart School to Sacred Heart's staff, resulting in excessive entanglement between church and state in violation of the Establishment Clause of the First Amendment.

The Church Defendants submit declarations and deposition testimony in support of their claim that no delegation of authority took place, and that Sacred Heart personnel did not participate in Chapter 1 educational activities. Chaterjee Deposition at 136; Sandles Deposition at 64, 67, 69-70, 82-83, 85. They maintain that the Chapter 1 program was administered solely by the School District. Leonardich Decl., ¶ 5; Reardon Decl., ¶ 6.

In opposition to summary judgment, Plaintiffs submit the deposition testimony of Barbara Curry ("Curry"), a Chapter 1 aide formerly employed by the School District who is a named defendant in this action.

According to her deposition testimony, Barbara Curry was recruited by Sister Margaret Ann Reardon (Reardon), Curry Deposition at 18. Curry set up the Chapter 1 program at Sacred Heart School, *Id.* at 23, and selected the equipment and furniture under Reardon's supervision. *Id.* at p. 25. Curry was involved in selecting children who would participate in Chapter 1. *Id.* at 31. Reardon gave Curry the suggestion as to how children were to be selected. *Id.* Curry's paycheck was drawn on the Hollister School District, *Id.* at 37, and was given to her by Reardon and her staff. *Id.* at 38. Reardon told her how many hours she could work, and monitored her hours. *Id.* at 38-39.

Moreover, Curry testified that she looked to Reardon as her boss, *Id.* at 47, receiving no instruction on the Chapter 1 program from the School District. *Id.* at 48-49. While the School District personnel did not make regular visits to monitor the Chapter 1 program, *Id.* at 47-49, Reardon sat in to observe the teaching, *Id.* at 52, and to check the students work. *Id.* at 53-54.

The conflicting evidence presented establishes a triable issue of material fact as to whether the School District delegated authority for the operation of the Chapter 1 program to the Church defendants.

* * * * * * *

Dated: January 11, 1993

/s/ James Ware
HONORABLE JAMES WARE
United States District Judge

APPENDIX D

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 90-20056 JW (EAI)

BARBARA HOLGUIN; et al.,

Plaintiffs,

v.

SACRED HEART SCHOOL; et al.,

Defendants.

[Received NOV 22 1993, Richard W. Wieking, Clerk, U.S. District Court, Northern District of California, San Jose]

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CONSENT JUDGMENT AS TO DEFENDANT HOLLISTER SCHOOL DISTRICT AND THE BOARD OF EDUCATION OF HOLLISTER SCHOOL DISTRICT

* * * * * * *

This action involves the providing of services to students enrolled in a sectarian school originally funded by Chapter 1

of the Elementary and Secondary School Act. Effective July 1, 1988, the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary Improvement Amendments of 1988 repealed the predecessor Chapter 1. However, as part of the same legislation, Congress enacted substantially the same program in the new legislation as Part A of Chapter 1 of Title I, recodified as 20 U.S.c. § 2701 *et seq.* With respect to the participation of eligible private school children, the new statutory provisions are essentially identical to Chapter 1, and the Chapter 1 program in the Hollister School District continues under the new statute. In this Consent Judgment the program will continue to be referred to as Chapter 1, and it will include all successor programs.

In this case, defendants Hollister School District and the Board of Education of Hollister School District and plaintiffs consent that a full and final judgment be entered in favor of the plaintiffs as to all claims between Hollister and the plaintiffs and the court being fully advised in the premises, therefore:

IT IS ORDERED, ADJUDGED, AND DECREED that defendants Hollister School District and the Board of Education of Hollister School District be permanently enjoined from providing funding and/or school district employees for live instruction under Chapter 1 or successor programs to students in any facility located on a sectarian school campus;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the aforesaid defendants shall not provide computer assisted instruction in any facility located on a sectarian school campus unless the computers provided through the program be secured so as to ensure that they will be utilized only for the purposes funded and provided for by the defendant school district, which computer equipment may be "locked" so that it can only use certain prescreened secular software or be secured in a separate room to which only school district employees have a key and access or by other reasonable means;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that in the event the computer equipment and materials are not so secured against improper use as a result of any objection or lack of cooperation by the staff at the sectarian schools whose students are the intended users of the equipment and materials, then such services may be provided to the students enrolled in the sectarian schools at a religiously neutral site off the campus of the church and/or sectarian school, such as, but not limited to, a public school site;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any computer assisted equipment and materials placed on the campus of a church and/or sectarian school under Chapter 1 or its successor program may be located at such a site only so long as the following criteria are met: a) The computer assisted program will be operated under the direction of defendant school district. b) On-site review by the school district will be limited to such matters as the installation, repair, inventory, turning equipment on and off, and maintenance of equipment. c) Sectarian school personnel may be present in the computer room to perform limited noninstructional functions such as maintaining order, assisting children with equipment operations (such as turning the equipment on and off, demonstrating the use of the computers, and accessing the program), and assisting with the installation, repair, inventory, and maintenance of the equipment. d) Neither public nor private school personnel will assist the students with instruction in the computer room. Public school personnel may, however, assist by providing instruction through computer messages, by telephone, or by television. e) Access to the computer equipment and the rest of the program will be limited to children eligible under the funded program. f) Equipment purchased with Chapter 1 funds will be used only for Chapter 1 purposes. Only software directly related to the Chapter 1 program may be used with the computer assisted instruction;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendants be permanently enjoined from delegating any authority to the sectarian school staff as to the administration of the Chapter 1 or successor programs, including, but not limited to, the selection of personnel and the evaluation of such personnel. Defendants shall regularly monitor the extent and nature of its personnel's contact with the staff of the sectarian school and regularly prepare written reports to the school district available to the public detailing the nature and extent of the contact between the school district's personnel and sectarian school staff and the implementation of the educational program;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the aforesaid defendants shall fully comply with the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) and 20 C.F.R. § 99, *et seq.* with regard to the records of plaintiff children. This shall include searching out and releasing to the plaintiffs all records relating to their respective children in the possession of the defendants or their employees and a list of all records ever maintained by said defendants on plaintiff children.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the aforesaid defendants pay to counsel for plaintiffs the sum of Twenty-Five Thousand Dollars ($25,000) as the aforesaid defendants' portion of the attorney fees and costs expended in connection with this matter. Said payment shall constitute full satisfaction of all monetary claims held by the plaintiffs against Hollister and its employees.

Dated: November 30, 1993

/s/ James Ware
UNITED STATES DISTRICT JUDGE

Approved as to form and content:

Dated: 11/16/93 /s/ Lee Boothby
LEE BOOTHBY, for and on behalf of Plaintiffs

Dated: 10/26/93

/s/ Thomas E. Andrade
THOMAS E. ANDRADE, Superintendent, for and on behalf of Defendants Hollister School District and the Board of Education of Hollister School District

Approved as to form:

Dated: 11/1/93

/s/ Louis A. Leone
LOUIS A. LEONE
Stubbs, Hittig & Leone, for and on behalf of Defendants Hollister School District and the Board of Education of Hollister School District

APPENDIX E

SACRED HEART SCHOOL

[Holguin art drawing of school by Joanne LoGuidice]

Parent-Student Handbook
Hollister, California

* * * * * * *

PHILOSOPHY OF EDUCATION

Sacred Heart School, a Catholic elementary school, commits itself to the following mission:

- to teach the Gospel message of Christ and to provide the skills needed to meet each child's need
- to build a community based on Jesus' command to love one another
- to serve through prayer, worship, and social action.

Sacred Heart School will provide an education through which children may:

a) receive the highest possible training in our Catholic tradition

b) acquire the knowledge, skills, attitudes, values, and character traits to enrich personal living

c) develop as responsible mature Christian citizens.

RELIGIOUS EDUCATION GOALS

The goals of Sacred Heart School are to create the following:

- A Christian atmosphere in which the students cooperate with grace to form Christ in themselves and those redeemed by Him;

- An awareness that students will have available guidance in order that they will be well informed to meet the needs of a changing society;
- A consideration that all children at Sacred Heart School regardless of ability, race, cultural background, or economic status will have opportunities for maximum growth;
- A cooperative response to share in the educational growth of the child with the home, the church, and other community agencies;
- A realization of the principles of citizenship that will enable the students of Sacred Heart School to enrich and improve the American way of life.

DIRECTORY

Department of Education	–	Monterey Diocese
Superintendent of Instruction	–	Agnes Leonardich

ADMINISTRATION

Pastor	Father Michael Miller
Principal	Sister Margaret Ann, O.P.
Assistant Principal	Mrs. Sandra Petersen
Secretary/Bookkeeper	Sister Francesca Bartos, O.P.

SCHOOL FACULTY

Kindergarten	Mrs. Felicia Andrade
Grade 1	Mrs. Judith McEntire Mrs. Janet Browne
Grade 2	Mrs. Joan Randolph
Grade 2 & 3	Mrs. Kathleen Taylor
Grade 3	Mrs. Nancy Irwin
Grade 4	Mrs. Susan Sweeley

Grade 4 & 5	Mr. Richard Galli
Grade 5	Mrs. Charlotte Dilley
Grade 6	Miss Marilyn Westphal
Grade 7	Mrs. Eileen McCullough
Grade 8	Mrs. Sandra Petersen
Physical Education	Mrs. Bridget Christenson
Aide (Chapter I)	Mrs. Barbara Sandles
Receptionist	Mrs. Susan Gonsalves
Librarian	Mrs. Adeen Gatherer
Music	Mr. Steve Azzapardi
Custodians	Mr. Victor Reyes Mr. Salvator Sanchez

* * * * * * *

CURRICULUM

We follow the curriculum guidelines of the State of California and the Diocese of Monterey in offering the following subjects:

Reading	English Grammar	History of Calif. & U.S.
Penmanship	English Composition	History
Spelling	Geography	Science
Civics	Music	Religion - Family Life
Health	Honors Algebra	P. E.
Arithmetic	Art	Chapter I & II
		Alcohol/Drug Abuse

* * * * * * *

APPENDIX F

[Line art, front entrance of Sacred Heart/flagstaff and flag]

PARENT/STUDENT GUIDELINES

Sacred Heart School

Hollister, California

Department of Education	–	Monterey Diocese
Superintendent of Instruction	–	Agnes Leonardich

ADMINISTRATION

Pastor	Father Michael Miller
Principal	Sister Margaret Ann, O.P.
Assistant Principal	Mrs. Sandra Petersen
Secretary/Bookkeeper	Sister Francesca Bartos, O.P.

SCHOOL FACULTY

Kindergarten	Sister Lois Rochon, O.P.
Grade 1	Mrs. Jane Maurer Mrs. Janet Browne
Grade 2	Mrs. Jeanette Langstaff Mrs. Joan Randolph
Grade 3	Mrs. Olga West Mrs. Nancy Irwin
Grade 4	Mrs. Felicia Andrade Mrs. Susan Sweeley
Grade 5	Mrs. Charlotte Dilley
Grade 5 & 6	Mrs. Penny Beingessner
Grade 6	Miss Marilyn Westphal

Grade 7	Mrs. Eileen McCullough
Grade 8	Mrs. Sandra Petersen
Physical Education	Mrs. Bridget Christenson
Aides (Chapter I)	Mrs. Barbara Curry Mrs. Barbara Sandles
Receptionist	Mrs. Susan Gonsalves
Librarian	Mrs. Frances Turner
Music	Mr. Kris Flores
Custodians	Mr. Victor Reyes Mr. Salvator Sanchez

APPENDIX G

ADDITIONAL GUIDANCE ON AGUILAR V. FELTON AND CHAPTER 1 OF THE EDUCATION CONSOLIDATION AND IMPROVEMENT ACT (ECIA) QUESTIONS AND ANSWERS

June 1986

* * * * * * *

24. *Question*: What are the requirements for consultation with private school officials?

    Answer: Section 200.70 of the Chapter 1 regulations states that the LEA shall provide services to children enrolled in private schools "in consultation with private school officials."

25. *Question*: When should this consultation take place?

    Answer: The LEA should first consult with private school officials before making any decision that significantly affects the opportunities of private school students to participate in the project. Therefore, consultation should take place before the LEA designs a plan to serve private school students. Consultation should then continue at appropriate stages throughout the term of the project.

26. *Question*: Should this consultation include discussion regarding the method the LEA will use in serving private school students?

Answer: Yes. While the LEA has final responsibility for deciding how and where services will be provided, consultation with private school officials should be an integral part of making those decisions.

27. *Question*: At what stages during the term of the project is consultation appropriate?

Answer: Consultation should occur before important decisions are made on the project, including when determinations are made concerning—

1. which children will receive benefits;
2. how the children's needs will be identified;
3. what services will be offered;
4. how and where those services will be provided; and
5. how the project will be evaluated.

A unilateral offer of services by the LEA with no opportunity for discussion is not adequate consultation. To ensure that proper consultation and offers of equitable services are documented, the use of a form detailing the consultation and offers, with a place for the signature of private school officials, may be useful.

28. *Question*: can Chapter 1 instructional personnel consult with private school personnel?

Answer: Yes. Chapter 1 teachers and other instructional personnel can consult with instructional staff from the private school in order to coordinate the Chapter 1 program with the regular classroom instructor and to facilitate the success of the services provided. Such consultation should not occur at the site of the Chapter 1 services while the services are being provided. To the extent practicable, the LEA may wish to have this consultation occur at a public school site, other neutral sites, or by telephone.

* * * * * * *

(22) (23)

No. 96-552, 96-553

Supreme Court, U.S.
FILED
MAR 27 1997
CLERK

In The

Supreme Court of the United States

October 1996 Term

RACHEL AGOSTINI, et al,

Petitioners,

- against -

BETTY LOUISE FELTON, et al,

Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION, et al,

Petitioners,

- against -

BETTY LOUISE FELTON, et al,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICUS BRIEF OF NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED

May Rule 60(b), Federal Rules of Civil Procedure, be used years later by a losing party as a procedural vehicle to seek to change the decisional law in the very same case the party litigated and lost when principles of finality, res judicata, law of the case, and the time requirements of the rule of this Court as to a rehearing petition otherwise foreclose reconsideration?

As this case is improvidently before the Court, should the writ of certiorari be vacated?

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B. Rehearing Procedure (Rule 44.1) not followed as to requirements of time and support of Justice in the majority 5

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In The

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#96-552, #96-553

RACHEL AGOSTINI, et al,

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICUS BRIEF OF NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON SUPREME COURT OF THE UNITED STATES

This brief is submitted with the consent of the parties. Letters reflecting such consent are being filed with the Clerk of the Court.

INTEREST OF AMICUS BAR ASSOCIATION COMMITTEE

The New York County Lawyers Association is a not-for-profit bar association based in New York City, in existence for almost a hundred years, with a membership of approximately 10,000 attorneys. The late Chief Justice Charles Evans Hughes served as its president during 1919-1921. The Association's Committee on the Supreme Court of the United States ("bar association committee") is committed to studying the practices and procedures of the High Court, and is protective of the Court's traditions, jurisprudence, jurisdiction, and procedures. Our programs include forums on the certiorari procedure, and on the substantive issues of the new federalism, separation of powers, and the first amendment.

As a bar association committee, we take no position as to the merits of the substantive issue as to the continued vitality of *Aquilar*. We differ from the parties and the other amici in that we limit our concerns to the procedural issue of Rule 60(b), FRCP — its appropriateness, its potential for good and harm, its future use and misuse. As such, we are the only amici who are purists — we have no axe to grind on the merits as to who should win or lose, or whether *Aquilar* should be sustained, vacated, or left alone for another day.

For jurisdictional purposes, we are deeply concerned as to whether or not Rule 60(b) should be used years later by a losing party to change the decisional law in the very same case they litigated and lost when principles of finality, res judicata, law of the case, and the time requirements of a rehearing petition in this Court otherwise foreclose reconsideration.

As a bar association committee, with no substantive agenda, we respect the carefully drafted position of the Solicitor General, who shares our procedural concerns, not just for this proceeding, but also for future proceedings before the Court. However, the Solicitor General in this instance is not an amicus, but counsel to a party — the Secretary of Education — with a vested interest in the outcome. His client's position has caused a difference between the Solicitor General and our committee as to the use in this instance of Rule 60(b). In contrast, our bar association group is detached — we do not have a client — and our interest is solely in protecting the integrity of procedural rules, and its limitations, in challenging established decisional law.

STATEMENT OF THE CASE

As the Court does not need another recitation of the statement of the case, we adopt the statement of the Solicitor General.

SUMMARY OF ARGUMENT

Rule 60(b), FRCP, may not be used as a procedural vehicle ten years later by a losing party to seek to change the decisional law in the very same case the party litigated and lost when principles of finality, res judicata, law of the case, and the time requirements of a rehearing petition in this Court otherwise foreclose reconsideration.

Rule 60(b) does not give a losing party a second appeal as to the merits of the underlying final judgment. Nor was Rule 60(b) designed to provide a vehicle for obtaining a change in existing decisional law.

The writ of certiorari should be vacated for this case is improvidently before the Court.

ARGUMENT

RULE 60(b) IS NOT AVAILABLE TO A LOSING PARTY TO SEEK TO CHANGE THE DECISIONAL LAW IN THE VERY SAME CASE THE PARTY LITIGATED AND LOST

A. DECISIONAL LAW DOES NOT SUPPORT USE OF RULE 60(B) TO CHANGE DECISIONAL LAW

In its earlier brief in support of the petition for certiorari, the Solicitor General wrote (pp. 11-12):

> "We are *not* aware however of any instance in which *the Court has reconsidered the merits* of a prior decision *in the same* case in a procedural posture similar to this one in which the case returned to this Court from a lower court *after entry of a final judgment on remand* and denial of a motion for relief from that judgment." (emphasis added).

Our research of decisional law confirms the position of the Solicitor General — there just are not any reported instances in which this Court, years later, at the request of the losing party, has reconsidered its prior decision *in the same case* involving the very *same parties*.

In its brief on the merits, in seeking to bypass well established jurisdictional limitations, the Solicitor General candidly conceded (page 46):

> "the *difficulty* here arises from the fact that the Court has decided *the precise issue in this very case*." (emphasis added).

We agree with the Solicitor General - it is indeed a "difficulty". However, the Solicitor General's attempt to make the "difficulty" disappear does violence to the limitations carefully adopted by this Court during years of decision making.

B. REHEARING PROCEDURE (RULE 44.1) AS TO REQUIREMENTS OF TIME AND SUPPORT OF JUSTICE IN THE MAJORITY NOT FOLLOWED

In footnote 18, at page 51 of its brief, the Solicitor General cites as support the Court's reversal of prior decisions, in successful rehearing petitions, in *Reid v. Covert*, 354 U.S. 1 (1957) and *Jones v. Opelika*, 319 U.S. 103 (1943). However, in each instance, in compliance with Rule 44.1 of the Supreme Court, the rehearing petition was timely filed within twenty-five days of the decision with the very same panel of nine Justices — and enjoyed the support of at least one justice who was a member of the majority and who was prepared to change his vote. In sharp contrast to our situation, the composition of the Court has substantially changed since 1985.[1] Only Justice

---

1

Change in composition of the Court does not provide a basis for reconsideration of decisional law. As stated in *Planned Parenthood v.*

Stevens remains as a member of the majority, and we have no indication that he is prepared to change his vote.

C. THERE IS AN ABSENCE OF AN APPROPRIATE RECORD TO WARRANT APPELLATE REVIEW

Justice O'Connor's concurring opinion in *Rufo v. Inmates of Suffolk Jail*, 502 U.S.367, (1992), dealing with the issue of modification of an injunction, is most helpful.

Justice O'Connor notes "the limited nature of our review", and reminds us "an appellate court should examine primarily *the method* in which the district exercises its discretion, not the substantive outcome the district court reaches." 502 US at 393, 394.

Of course, in our situation the district court never exercised its discretion; never engaged in the balancing of competing and complex factors; never conducted an evidentiary hearing; never made findings of fact and conclusions of law; never developed a full record appropriate for appellate review in the first instance by the Court of Appeals and subsequently in limited situations, by this Court; and never concluded that the City of New York had met its heavy burden of demonstrating changed circumstances warranting modification of an injunction of twelve years duration which fully and satisfactorily implemented the Title I

Casey, to abandon principles of stare decisis to overrule a case "on ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of government. No misconception can do more lasting injury to this Court and to the system of law." 505 U.S. 833, 864.

remedial program for students, but at a cost to the City of New York. There just is no district court record for the Court to review.

In the majority opinion, Justice White observed that a district court may modify an injunction *only* when it is "no longer equitable", *not* when it is "no longer convenient". 502 U.S. at 383. Also Justice White noted modification by the district court is not warranted when a party relies upon events that from the inception were anticipated or foreseen. 502 US at 385. Again, in our matter, we have no findings by the district court, or even an appropriate record of testimony and exhibits, to support any such conclusions as to changed circumstances and/or no longer equitable.

No compelling reason has been advanced by the City of New York why this Court should rush to judgment and ignore well established rules governing injunction litigation, appellate review, and Rule 60(b).

Basically the complaint of the City of New York is that the compliance with *Aquilar* costs money. Obviously all parties knew that fact from the inception — it was foreseen and foreseeable — transportation (busing) of students always costs money. While Justice O'Connor noted that expense factors can never be used to avoid constitutional requirements, and that local fiscal matters can be considered in limited non-constitutional requirements, in our situation, the City of New York's complaint is that Congress will not finance the extra expenses —purely a legislative and political issue. The fact that Congress chose not to appropriate funds does not convert a legislative decision into a "case or controversy" for the federal courts to adjudicate.

Nor should this Court be asked to render an advisory opinion as to what it would do *if* it had the benefit of a fully developed district court record; if it had findings of fact and conclusions of law from the district court; and if it had a decision on the merits from the Court of Appeals. In the absence of these prerequisites, this Court is being asked to decide the controversy between the parties as if it were a district court ruling on a motion to dismiss the initial pleading.

D. AS DECISIONAL LAW SUPPORTING INJUNCTION IS STILL EXISTING LAW, THERE IS NO BASIS FOR USE OF RULE 60(b)

Nor does the posture of the decisional law require this Court to stretch at this time to reevaluate its prior decision in *Aquilar*. In *Bowen v. Kendrick*, 487 US 589 (1988) and *Zobrest v. Catalina Foothills School District*, 509 US 1 (1991), cited for support by the Solicitor General, the Court chose not to reassess *Aquilar*, and decided each case without disturbing *Aquilar*. In *Kiryas Joel* (512 US 687) the Court had no difficulty reaching its decision without vacating *Aquilar*. As such, in three matters the Court chose not to vacate *Aquilar*. Obviously, if in any of these cases the Court had vacated *Aquilar*, we would then have decisional law undermining the legal basis of the injunction, and this "change of circumstances" would support a modification of the injunction. *Pasadena City Board of Education v. Spangler*, 427 US 424, 433-435 (1976), relied upon by the Solicitor General, requires that intervening decisional law shall have been enunciated as decisional law in a prior case by a majority of the Court, and not merely be suggestions for a change in the law expressed in concurring opinions or dissenting opinions by individual justices. As the Court wrote *In re Permian Basin*

Area Rate cases, "this Court does not decide important questions of law by cursory dicta inserted in unrelated cases". 390 U.S. 747, 775 (1968).

In his recent treatise, *A Matter of Interpretation: Federal Courts and the Law*, Justice Scalia explained that the law in order to survive requires formalism and the adherence to established procedures. "The rule of law is about form" at 25. Our committee agrees, and requests this Court not to deviate from well established procedures and decisional law. The price is too high. In law as in sports, form prevails.

CONCLUSION

As this case is not appropriately before the Court for resolution, the writ of certiorari should be vacated.

Alternatively, the Court should hold that the use of Rule 60(b) in this matter is not permissible.

Dated: March 25, 1997

Respectfully submitted,

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Nos. 96-552 & 96-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,

Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,

Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE INSTITUTE FOR JUSTICE, THE CENTER FOR EDUCATION REFORM, PARENTS FOR SCHOOL CHOICE, AND HOPE FOR CLEVELAND'S CHILDREN IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae are organizations strongly committed to education reform and particularly to expanding parental choice in education. The legal issues raised in the present cases directly implicate *amici*'s institutional interests.

The Institute for Justice is a nonprofit public interest law center that litigates in support of private property rights, entrepreneurial freedoms, school choice, and other individual liberties. The Institute presently is defending the constitutionality of programs in Wisconsin, Ohio, and Vermont that allow parents to direct public education funding to the schools of their choice, including religious schools.

The Center for Education Reform ("CER") is an independent non-profit organization founded in 1993 to advance substantive reforms in public education by working to ensure that ideas critical to education reform are identified, understood, and implemented. CER is an active broker in bridging policies and practices through coalition building and by working with diverse constituencies to implement reforms that improve access, accountability, and assessment, and that help restore educational excellence and equity to America's public schools.

Parents for School Choice ("PSC") is a nonprofit community organization that provides information and

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[*] The parties have consented to the filing of this brief. *Amici* have filed letters of consent with the Clerk.

support for economically disadvantaged Milwaukee parents to expand the range and quality of educational opportunities available to their children. PSC was the leading catalyst for the expansion of the Milwaukee Parental Choice Program, Wis. Stat. § 119.23, which allows up to 15,000 low-income Milwaukee children to use their share of state education funds in private schools. PSC is an intervenor/defendant in litigation challenging the choice program's constitutionality.

Hope for Cleveland's Children ("Hope") is a nonprofit organization founded to improve the education of Cleveland's children and to maximize the options of Cleveland parents. Hope was instrumental in bringing about the Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§ 3313.974-.979, which allows Cleveland youngsters to receive publicly funded scholarships to attend private schools or public schools in adjacent districts. Hope has opened two schools in Cleveland to serve economically disadvantaged youngsters. Hope is an intervenor/defendant in a lawsuit challenging the scholarship program's constitutionality.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Title I program at issue in these cases is designed to address one of this Nation's most vitally important problems: the education of underprivileged children. The present *amici* are interested primarily in an additional, alternative approach to this problem. We promote and defend programs that offer low-income parents a meaningful choice of educational alternatives for their children through publicly funded vouchers and scholarships. To be fully effective, these programs must include a wide

variety of educational options, including high quality parochial schools. State sponsorship of such school choice programs is the subject of ongoing litigation that presents constitutional issues closely related to those the Court will consider here.

Amici believe that the principles this Court has enunciated in its prior Establishment Clause decisions mandate the conclusion that school choice programs are constitutional. *Amici* do not, of course, ask this Court to address this question in the present cases. We ask only that the Court remain cognizant of school choice in crafting its opinion, and that the Court thereby reaffirm the principles *amici* believe establish the constitutionality of state-sponsored school choice.

Solutions to the crisis in the education of underprivileged children inevitably will involve private and parochial schools, which often are the only institutions providing high-quality education in inner-cities. Unfortunately, our present system consigns poor parents and their children to failed public schools. School choice programs give these parents a way out—the option to choose the best education for their children. By providing partial or full tuition for parents who choose private or alternative public schools, school choice programs empower parents to control their children's future, and promote accountability and incentives for improvement among the schools in competition for parents' tuition dollars. School choice enables parents to exercise their constitutional right to choose their children's school, including their right to choose a parochial school.

Two fundamental aspects of state-funded school choice programs ensure that they do not constitute an establishment of religion: such programs are neutral toward religion, and they "aid" sectarian institutions only indirectly through the independent and private decisions of individual parents. School choice programs that give parents an option to send their children to parochial schools are neutral towards religion because they provide assistance to a class of beneficiaries defined without reference to religion and do not restrict choices to religious schools. School choice programs do not constitute direct aid to sectarian institutions because no funds are transmitted to schools except upon the direction of parents. "Where ... aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller v. Allen*, 463 U.S. 388, 399 (1983). Whatever the outcome in the present cases, the Court should hold inviolate these Establishment Clause principles of neutrality and private decision making.

These principles cannot be reaffirmed often enough. In a recent decision of the Wisconsin trial court considering the constitutionality of the state-funded school choice program in Milwaukee, the court refused to accept this Court's constitutional delineation between direct and indirect assistance. To the Wisconsin court, a program of parental choice constitutes state assistance to sectarian schools no less direct than if the state had determined where the money was to go; this Court's decisions to the contrary were simply misguided: "Although the U.S. Supreme Court has chosen to turn its head and ignore the real impact of such aid, this court refuses to accept that myth." *Jackson v. Benson*, No. 95-CV-1982, Memorandum

Decision and Order at 28 (Wisc. Dane Cty. Circ. Ct. Jan. 15, 1997). A rule that can engender this kind of disrespect from lower tribunals is in need of reassertion.

ARGUMENT

I. THE NATION DESPERATELY NEEDS INNOVATIVE SOLUTIONS TO THE CRISIS IN THE EDUCATION OF POOR CHILDREN

A. Low-Income Children Are Not Receiving the Education They Deserve

The importance of education to the lives of our children and the future of our Nation is beyond peradventure:

> [E]ducation is ... a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Board of Education, 347 U.S. 483, 493 (1954). Education provides not only the basic skills necessary for meaningful participation in the American economy and political system, but, at least as important, inculcates those basic values critical to the orderly functioning of American society.

The American education system has failed many of our children. In the 1991 International Assessment of

Educational Progress, United States 13-year-olds ranked twelfth of fourteen countries in math and science. Daniel McGroarty, *Break These Chains: The Battle for School Choice* at 17-18 (Forum, 1996). The bellwether National Assessment of Educational Progress ("NAEP") reveals that only 30 percent of fourth graders, 30 percent of eighth graders, and 36 percent of twelfth graders nationwide were reading at a proficient level in 1994. Paul L. Williams, et al., *NAEP 1994 Reading: A First Look* at 15 (U.S. Dept. Ed., 1995). In the interval between 1992 and 1994 alone, the average reading assessment score for twelfth-grade students declined significantly. *Id.* at 7.

These educational deficiencies are greatest among poor and minority children. "[I]n large cities—whose poor and minority children desperately need quality education—the [high school drop out rate] can climb to 50 percent." John E. Chubb and Terry M. Moe, *Politics, Markets, and America's Schools* at ix (Brookings, 1990). In the District of Columbia, for example, more than 40 percent of public school students drop out before high school graduation. Valerie Strauss and Sari Horwitz, *Students Caught in a Cycle of Classroom Failures*, Washington Post A1 (Feb. 20, 1997). Recent NAEP data shows African-American and Hispanic children lagging considerably behind whites in reading, writing, math, and science performance at all ages and grade levels studied—17-year-old black students in 1994, for example, were reading at a level equivalent to 13-year-old whites—and the gap generally has been growing in recent years. Jay R. Campbell, et al., *Report in Brief: NAEP 1994 Trends in Academic Progress* at 7, 9, 11 (U.S. Dept. Ed., 1996). Widespread drug use and rampant violence in the schools that are supposed to be serving these children contribute to and compound these problems. It is

no wonder that a recent national survey found that only 16 percent of respondents believe children in America's inner cities are receiving the education they need. International Communications Research, *A National Survey of Americans' Attitudes Toward Education and School Reform* at 3 (Center for Education Reform, 1996). In many inner-city schools, there simply is no education taking place.

Sadly, for the overwhelming majority of children and their parents who are the victims of this failed system, there is no way out. For most poor children, education overwhelming is received through a single provider, the local school district, which determines what, where, and how students will be taught, with virtually no parental choice in these fundamental matters.[1]

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[1] One of the earliest critiques of the monopolistic American education system came from Kenneth Clark, the educator and psychologist whose work with African-American children so influenced this Court's decision in *Brown*:

> [I]t appears that the present system of organization and functioning of urban public schools is a chief blockage in the mobility of the masses of Negro and other lower-status minority group children. ... [M]inority group children are ... victims of the monopolistic inefficiency of the present pattern of organization and functioning of our public schools.

Kenneth B. Clark, "Alternative Public School Systems," *Network News & Views* at 8, 15 (July 1994) (reprinted from 38 *Harvard Educational Review* (Winter 1968)).

B. Solutions to These Problems Necessarily Must Involve Private and Parochial Schools

Alternatives exist, for those who can afford them, in the very neighborhoods where public school students perform worst. The educational performance of children in private and parochial schools considerably exceeds that of children from similar backgrounds attending public schools. *E.g.*, James S. Coleman, Thomas Hoffer, and Sally Kilgore, *High School Achievement* at 180-81 (Basic Books, 1982). Private and parochial schools provide a safer, more disciplined, and orderly environment than public schools, and impose greater academic demands. *Id.* The recent NAEP data reveal that private school students' reading performance exceeded public school performance at all grade levels examined. *NAEP 1994* at 12. Public school students lacked basic reading skills at more than twice the rate of their private and parochial school counterparts. *Id.* at 22.

"Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans." *Mueller v. Allen,* 463 U.S. 388, 401-02 (1983) (internal quotations omitted). Nowhere has this been more evident than in the education of poor and minority children. In the words of economist Thomas Sowell, "'One of the great untold stories of contemporary American education is the extent to which Catholic schools, left behind in ghettoes by the departure of their original white clientele, are successfully educating black youngsters there at low cost.'" Quoted in Daniel Patrick Moynihan, "Government and the Ruin of Private Education," *Harper's* at 28, 37 (April 1978).

Disadvantaged students in Catholic schools have a lower dropout rate than their peers in public schools. Diane Ravitch, "Somebody's Children," *The Brookings Review* at 9 (Fall 1994). Parental participation is greater in Catholic schools than in public schools, with parents of poor African-American students in particular participating in the PTA at much higher levels in Catholic schools. *Id.* Catholic school students consistently score higher in standardized tests. *Id.* One recent study found Catholic school students' average math achievement "considerably higher" than that of public school students from the same economic class: "By senior year, lower-middle class students attending Catholic schools are achieving 4.5 years ahead of their counterparts in the public sector." Anthony S. Bryk, Valerie E. Lee, and Peter B. Holland, *Catholic Schools and the Common Good* at 246-48 (Harvard, 1993). In Catholic high schools, the average learning rate in math for minority students between the sophomore and senior years was 65 percent faster than the average learning rate of public school students in general, and 100 percent faster than that of their minority counterparts in public schools. *Id.* The study also found that math performance of Catholic school students varies less with economic class than in public schools, and that the difference in math performance between white and minority students is narrower in Catholic schools. Over time, moreover, the white/minority gap narrows in Catholic schools, while it increases in the public schools. *Id.* Such results have led one distinguished research team to conclude: "Catholic schools more nearly approximate the 'common school' ideal of American education than do public schools." *High School Achievement* at 185.

C. School Choice Programs Improve Education By Enabling Poor Parents to Choose the Best Schools For Their Children

The great success of inner-city private and parochial schools has focused attention on education reform proposals that would provide poor parents the opportunity to choose their children's schools. School choice programs provide such opportunities by giving these parents control over a share of their children's education funds to spend wherever they choose. By increasing the educational opportunities available to individual poor and minority children, and thereby increasing competition among public and private schools, school choice programs improve education generally.[2]

A study by two researchers for the Brookings Institution found that when choice is introduced, several mechanisms come into play to improve education: First, a

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[2] School choice also enables parents' fundamental right to choose their children's education, including their right to choose a parochial school. "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of the Sisters of the Holy Names*, 268 U.S. 510, 535 (1925) (Oregon law mandating that all children between the ages of 8 and 16 attend public school "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.").

"process of selection and sorting" occurs, whereby families with different educational goals choose the school that best fits their needs. *Politics, Markets, and America's Schools* at 32-33. The result is a rich educational pluralism: in District 4 in East Harlem, where parents have been freed to choose among different public elementary and junior high schools, successful new schools have arisen to meet the interests of parents and students, including the School of Science and Humanities, the Jose Feliciano Performing Arts School, and the East Harlem School for Health and Bio-Medical Studies. *Id.* at 213.

Second, choice makes schools directly accountable to the clientele they serve. Once a family has selected a school, they should find the school more responsive to their needs and interests.

Third, family movement between schools encourages schools to improve or face declining enrollment and revenues. This is the same economic discipline to which most American institutions and services are subjected, including, of course, our nation's unparalleled colleges and universities.[3] Parochial and other private schools already "afford wholesome competition with our

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[3] Former Xerox Chairman and Deputy U.S. Secretary of Education David T. Kearns has described the American public education system as "the only industry we have where if you do a good job, nothing good happens to you, and if you do a bad job, nothing bad happens to you." Quoted in Abigail Thernstrom, *School Choice in Massachusetts* at 44 (Pioneer Inst., 1991).

public schools." *Mueller*, 463 U.S. at 402 (internal quotations omitted). But with the increased competition engendered by school choice programs, "the quality of all schooling [will] rise so much that even the worst [school], while it might be *relatively* lower on the scale, would be better in *absolute* quality." Milton and Rose Friedman, *Free to Choose* at 170 (Harcourt Brace Jovanovich, 1980) (emphasis original).[4]

The school choice programs conducted to date have delivered precisely the increased parental satisfaction and student performance that their proponents predicted. Two programs in place in Milwaukee, Wisconsin provide striking examples. Partners Advancing Values in Education ("PAVE"), the nation's largest privately-funded voucher program, currently is in its fifth year of operation. PAVE is a privately-funded voucher program run alongside the state-funded scholarship program established for the Milwaukee public schools. A court decision thus far has barred students from applying their state-funded scholarships at religiously-affiliated schools (and thereby effectively barred participating students from a large portion

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[4] School choice offers other benefits as well. For instance, choice "is being used to combat racial segregation; indeed, it has become the preferred approach to desegregation in districts throughout the country—in Rochester and Buffalo (New York), Cambridge (Massachusetts), and Prince George's County (Maryland), to name a few." *Politics, Markets, and America's Schools* at 206. And, of course, as in any other area in which competition is introduced, school choice will the lower cost of education.

of the city' most successful schools), but has allowed low-income youngsters to attend nonsectarian private schools for the past seven years. *See Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992). PAVE, on the other hand, has included parochial schools since its inception. PAVE grants are made to low-income families residing in the Milwaukee metropolitan area who choose to enroll their children in a private elementary or secondary school. Grants are available for up to half of the chosen school's annual tuition.

A 1995 study of PAVE shows an extraordinary level of satisfaction among participating parents. Fully 96 percent of parents said they were satisfied or very satisfied with the amount their children learned, and 96 percent also described themselves as satisfied or very satisfied with their children's teachers. Ninety-seven percent expressed satisfaction with the opportunities the school provided for parent involvement; 92 percent rated their child's school an A or B. Maureen Wahl, *Third-Year Report of the PAVE Scholarship Program* at 6 (PAVE, 1995).

Though improvements in educational performance are more difficult to assess, after only two years, more than 63 percent of PAVE students tested at or above the 50th national percentile rank ("NPR") in reading, and more than 60 percent tested at or above the 50th NPR for math. By contrast, among low-income students in Milwaukee public schools, only 25.2 percent tested at or above the 50th NPR in reading, and only 33.5 percent were at or above the 50th NPR in math. Maureen Wahl, *Second-Year Report of the PAVE Scholarship Program* at 22 (PAVE, 1994).

Similar results have been reported from the state-funded Milwaukee program. Thirty-six percent of choice parents graded their children's school an "A," compared with 27 percent of public school parents, and "[c]hoice parents expressed substantially greater satisfaction than did public school parents with every aspect of their child's education: the amount their child learned, the teacher's performance, the program of instruction, the discipline in the school, the opportunities for parental involvement, the textbooks, and the location of the school." Paul E. Peterson, *A Critique of the Witte Evaluation of Milwaukee's School Choice Program* at 37-38 (Center for American Political Studies, Harvard Univ., 1995).

Even more impressive are the data on academic achievement in Milwaukee. An important recent examination of the Milwaukee program compared the students in the program, who had been selected randomly for inclusion, to a control group who had applied for the program but had been rejected by the same random process. Paul E. Peterson, Jay P. Greene & Chad Noyes, "School Choice in Milwaukee," *The Public Interest* at 38 (Fall 1996). By their third year in the program, choice students scored 3 percentile points higher on a standardized reading test and 5 percentile points higher on a math test than the control group. By year four the differences were even greater, with choice students scoring 5 percentile points higher in reading and 11 percentile points higher in math. *Id.* at 55. These results, "[i]f duplicated nationwide, ... could reduce by somewhere between one-third and more than one-half the current difference between white and minority test score performance." *Id.*

II. UNCHALLENGED PRINCIPLES OF NEUTRALITY AND PRIVATE DECISION MAKING ESTABLISH THE CONSTITUTIONALITY OF STATE-FUNDED SCHOOL CHOICE PROGRAMS

Two fundamental aspects of state-funded school choice programs ensure that they do not constitute an establishment of religion: such programs are neutral toward religion, and they "aid" sectarian institutions only indirectly through the independent and private decisions of individual parents.

"A central lesson of [this Court's] decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510, 2521 (1995). School choice programs that give parents an option to send their children to parochial schools are neutral towards religion because the class of beneficiaries is defined without reference to religion, and no financial incentive exists to choose private or religious schools. Such is the nature of the programs in Milwaukee and Cleveland, for example, currently under challenge in the state courts. *See* Wis. Stat. § 119.23; Ohio Rev. Code Ann. §§ 3313.974-.979. The state provides the same benefits to these parents irrespective of the nature of the particular school the parents choose for their children. "[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 115 S.Ct. at 2521.

The *Rosenberger* Court suggested, nonetheless, that "even ... a neutral program that includes nonsectarian recipients" might violate the Establishment Clause if "the government is making direct money payments to an institution or group that is engaged in religious activity." *Id.* at 2523. Assuming *arguendo* that such payments would constitute an Establishment Clause violation, school choice programs do not suffer from this infirmity because the recipients of government benefits in such programs are the parents, not religious schools. "Where ... aid to parochial schools is available only as a result of *decisions of individual parents* no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)) (emphasis added).

In *Mueller*, the Court sustained against Establishment Clause challenge a Minnesota statute that allowed parents to deduct from their taxes tuition and other educational expenses incurred in sending their children to elementary and secondary schools, including parochial schools. The Minnesota program, like more traditional school choice programs involving vouchers or direct payment to parents, provided benefits to parents sending their children to both public and private schools, with no preference for the sectarian or nonsectarian nature of the school. As in *Rosenberger*, the Court declared that "a program, like [the Minnesota statute], that neutrally provides state assistance to a broad spectrum of citizens is

not readily subject to challenge under the Establishment Clause." *Id.* at 398-99.[5] Petitioners argued that the financial assistance provided to parents under the Minnesota program ultimately had an economic effect comparable to aid given directly to the schools. The Court explained the

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[5] The *Mueller* Court expressly distinguished *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). In that case, the Court held that a tuition assistance grant to parents for use at private schools only violated the Establishment Clause. The *Nyquist* Court noted, however, that assistance made generally available without regard to the sectarian-nonsectarian or public-nonpublic nature of the school might not offend the Establishment Clause. *Id.* at 782-83 n.38. That case arose in *Mueller v. Allen*. The Court there explained the "vital difference" between the universally-applicable Minnesota tax credit and the New York statute at issue in *Nyquist*: In *Nyquist*, "public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools" thus showing a possible state preference for parochial schools. *Mueller*, 463 U.S. at 398 (emphasis original). Moreover, *all* of the various aid programs challenged in *Nyquist* directed assistance exclusively to private schools.

The Court noted in *Mueller* that *Nyquist* is an aberration in Establishment Clause jurisprudence. 463 U.S. at 399. To the extent *Nyquist* is still good law, *Mueller* constrained that case to its facts. School choice programs do not run afoul of *Nyquist* because, like the program in *Mueller*, they provide assistance to children attending both sectarian and nonsectarian, public and nonpublic schools, or they exist within an overall framework of school reform that provides a wide range of public and private educational options.

critical difference: "under Minnesota's arrangement public funds become available only as a result of numerous *private choices of individual parents* of school-age children." *Id.* at 399 (emphasis added). Accordingly, there was no "imprimatur of state approval," and no Establishment Clause violation.

The Minnesota program at issue in *Mueller*, which allowed parents to deduct part of their tuition payments from their taxes, is analytically identical to school choice programs like those in Milwaukee and Cleveland, which essentially reimburse parents for part or all of the tuition they pay. In each case, the state has lessened the financial burden on parents who choose a private school for their children. But it remains the *parents* who may choose a parochial school; the state provides no aid to religious organizations. State financial assistance to parents constitutes no establishment of religion.

This Court twice has reaffirmed the rule in *Mueller*, emphasizing that individual choice negates any claim of establishment of a state religion. The petitioner in *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986), sought to use money from a Washington state vocational rehabilitation program for the blind to attend a Christian college. The Court ruled that the Establishment Clause does not preclude such assistance where aid is provided to the individual who chooses the school to attend. "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.... [T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Id.* at 488.

Mueller and *Witters* provided the rule of decision in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993). The Court there held that the Establishment Clause does not prevent the state from providing a deaf student with a sign-language interpreter to accompany him to classes at a Catholic high school. Again the Court explained that any benefit flowing to the school from the disability assistance program was attributable to the private choices of individual parents, and not the action of the state. *Id.* at 10.

Mueller, *Witters*, and *Zobrest* answer definitively any Establishment Clause challenge to school choice. Even the dissent in *Rosenberger*—which concluded that state payment of printing costs for a sectarian student publication violates the Establishment Clause—acknowledged the continuing vitality of *Mueller*, *Witters*, and *Zobrest* and the decisive importance of private decision making in Establishment Clause jurisprudence: the "'attenuated financial benefit[s] [to sectarian institutions], ultimately controlled by the private choices of individual[s],' ... are simply not within the contemplation of the Establishment Clause's broad prohibition." *Rosenberger*, 115 S.Ct. at 2542 (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.) (quoting *Mueller*, 463 U.S. at 400). Providing assistance to parents so that they might choose between various public and private educational alternatives is not a "law respecting an establishment of religion" under any rational understanding of that constitutional phrase.

III. WHATEVER THE OUTCOME IN THESE CASES, THE COURT SHOULD REAFFIRM THOSE PRINCIPLES THAT VALIDATE SCHOOL CHOICE

The foregoing analysis should remain sound however the Court decides these cases. Thus, a decision to overrule *Aguilar v. Felton*, 473 U.S. 402 (1985), and allow Title I services in parochial schools on the same basis they are allowed in public and other private schools, will constitute a reaffirmation of the principle of neutrality. Like school choice programs, Title I provides services to underprivileged children irrespective of the sectarian or nonsectarian nature of the school they attend. Such programs carry a strong presumption of constitutionality.

The Court invalidated the Title I program at issue in *Aguilar* because it concluded that the provision of government funded instruction in parochial schools constitutes an excessive entanglement between church and state. 473 U.S. at 409. Several members of the Court have called for the reconsideration or overruling of this decision, and have questioned the continuing utility of the entanglement prong of the Establishment Clause test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S.Ct. 2481, 2498 (O'Connor, J.), 2505 (Kennedy, J.), 2515 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J.) (1994). Reversal in the present cases will require the Court either to recede from the expansive reading of entanglement in *Aguilar*, or discard excessive entanglement as an element of Establishment Clause jurisprudence altogether. In either event, the Court will hold that the mere involvement of the state in attempts to

improve the education of children in a variety of schools is not the establishment of religion. School choice programs will benefit.

Reaffirmation of *Aguilar*, on the other hand, likely will require a finding of excessive entanglement in the provision of Title I services in parochial schools.[6] The

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[6] The *Aguilar* Court did not purport to find a problem with Title I under the first two prongs of the *Lemon* test: a valid secular purpose, and a primary effect that neither advances nor inhibits religion. *See Lemon*, 403 U.S. at 612. Assuming *Lemon* still provides the relevant inquiry in Establishment Clause cases, school choice programs meet these two criteria. Like Title I, school choice programs are designed to promote the valid secular purpose of improving education for underprivileged children. As to primary effect, a majority of the Court in *Witters* declared that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries." 474 U.S. at 490-91 (Powell, J., joined by Burger, C.J., and Rehnquist, J.); *id.* at 490 (White, J.) (agreeing with Powell on this point); *id.* at 493 (O'Connor, J.) (same).

For the same reason, school choice programs do not constitute an unconstitutional "endorsement" of religion. *Id.* at 493 (O'Connor, J.) ("The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw ... an inference that the State itself is endorsing a religious practice or belief.").

entanglement about which the Court was concerned in *Aguilar* derived from the presence of government funded instructors in parochial school classrooms and the efforts necessary to keep the government and religious instruction separate. 473 U.S. at 412-13. No such problem exists in school choice programs because there is no such contact between the state and parochial schools. The schools provide education as they see fit (subject only to the ordinary requirements for state accreditation) and receive payment for their services from the parents of the children who attend. The state puts money behind the parents' choices, and may establish certain minimal requirements for school participation in the choice program, such as nondiscrimination in admissions. But the state does not otherwise interact with the school or involve itself in the school's internal affairs. Nor does it matter that state funds can be traced to sectarian institutions as part of a school choice program, as long as the decision to choose a particular school is in the hands of a parent or student. *See, e.g., Witters*, 474 U.S. at 751.[7]

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[7] In his concurrence in *Aguilar*, Justice Powell asserted another alleged infirmity of the Title I program at issue in these cases: the program violates the Establishment Clause because it "amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require." 473 U.S. at 417 (Powell, J., concurring). Even if the Court agrees with Justice Powell in these cases, it is plain that school choice programs do not relieve parochial schools of any duty they otherwise would have assumed. Absent state funding, the children in choice programs would be unable to

[Footnote continued on next page]

However the Court chooses to characterize the Title I program in the present cases, school choice programs provide no aid to schools; they provide aid to *parents*. The provision of financial assistance to low-income parents does not help private and parochial schools; it simply widens the circle of students who may be enriched by the superior education these schools offer. The Court can reaffirm in this case that indirect effects on parochial schools resulting from the independent and private choice of parents are not proscribed by the Establishment Clause.

[Footnote continued from previous page]

attend private and parochial schools; the schools are relieved of no burden because the state enables these children to attend classes.

CONCLUSION

"[I]t is doubtful that any child may reasonably be expected to succeed in life if ... denied the opportunity of an education." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Poor students trapped in dangerous and nonfunctioning public schools today suffer from a *de facto* system of segregation no less oppressive than that at issue in *Brown*. Access to quality private and parochial schools offers a way out. *Amici* ask that this Court take care to reaffirm the constitutional principles that will allow help for those who most need it.

Respectfully submitted,

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RACHEL AGOSTINI, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

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QUESTIONS PRESENTED

1. Whether the Court should overrule its decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

2. Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief petitioners seek.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-552

RACHEL AGOSTINI, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

No. 96-553

CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 11a-13a)[1] and the district court (Pet. App. 1a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1996. The petitions for a writ of certiorari were filed on October 7, 1996, and were granted on January

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 96-552.

17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion."

2. Federal Rule of Civil Procedure 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment, order, or proceeding for the following reasons: * * * (5) * * * it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

STATEMENT

1. This case involves a federally funded program to provide remedial instruction and support services to needy elementary and secondary school students. See 20 U.S.C. 6301 *et seq*. To qualify for assistance under the "Title I" program,[2] a student must reside within the attendance

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[2] The program at issue was originally known as "Title I," because it was first enacted as Title I of the Elementary and Secondary Education Act of 1965. In 1981, Congress enacted Chapter 1 of the Education Consolidation and Improvement Act, Pub. L. No. 97-35, Tit. V, Subtit. D, 95 Stat. 357, 464, as a continuation of Title I, and the program became known as "Chapter 1." See *Aguilar* v. *Felton*, 473 U.S. 402, 404 n.1 (1985) (discussing the program's earlier history). In 1988, Congress enacted a new version of the program in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §§ 1003(a), 6303(a), 102 Stat. 431. Effective July 1, 1995, the Chapter 1 program again became known as "Title I," pursuant to the Improving America's Schools Act

boundaries of a public school located in a low-income area, and must be failing, or at risk of failing, the State's student performance standards. 20 U.S.C. 6313, 6315(b). Title I funds may be used only to supplement, and not to supplant, the students' regular classroom instruction. 20 U.S.C. 6322(b); 34 C.F.R. 200.12(a).

Local educational agencies (LEAs) that receive federal Title I funds must provide Title I services "equitabl[y]" to students in secular and religious private schools as well as public school students. See 20 U.S.C. 6321(a) and (d); 34 C.F.R. 200.10-200.11.[3] Expenditures for services to private school children must be equal to the proportion of funds allocated to participating public school attendance areas for low-income children attending private schools. 20 U.S.C. 6321(a)(4), 6313(c). When used for students in private schools, Title I funds may be used only to meet the needs of the students, and not the "needs of the private school" itself. 34 C.F.R. 200.12(b).[4]

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of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3519. The most recent legislation made substantive changes in the program, but none of those changes materially affects the issues in this case.

[3] If state or local law prohibits the LEA from providing "equitable" services to students in private schools, then the Secretary of Education shall arrange for the direct provision of services to such students. 20 U.S.C. 6321(d).

[4] Title I states that federal funds may be used for schoolwide improvements when "the school serves an eligible school attendance area in which not less than 50 percent of the children are from low-income families" or "not less than 50 percent of the children enrolled in the school are from such families." 20 U.S.C. 6314(a)(1)(B). The Department of Education has interpreted that provision to apply only to public schools; the Department's current regulations and policy guidance make clear that no religious school may participate in the schoolwide improvement provisions of the current law. See 34 C.F.R. 200.12(b) ("An LEA shall use funds under this subpart to meet the special educational needs of participating private school children, but

All Title I services provided to children in private schools must be "secular, neutral, and nonideological." 20 U.S.C. 6321(a)(2). Further, Title I services for private school children may be provided only through public employees, or through other persons independent of the private school and of any religious organization in the provision of those services. 20 U.S.C. 6321(c)(2). Funds for services to private school children must remain under the control of a public agency, and no funds may be provided to any private school. 20 U.S.C. 6321(c)(1). Private school officials are consulted in the design and development of Title I services for private school children, 20 U.S.C. 6321(b), but public school officials "make the

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not for * * * [t]he needs of the private school * * * or * * * [t]he general needs of children in the private school."); see also U.S. Department of Education, Office of Elementary and Secondary Education Compensatory Education Programs, Tit. I, Pt. A Policy Guidance, "Improving Basic Programs Operated By Local Educational Agencies" (Apr. 1996), Providing Services to Eligible Private School Children, at 13 (Policy Guidance) ("Because private schools are not eligible for Title I services [only their eligible children are], schoolwide programs may not be operated in private schools.") (App., *infra*, 1a-2a). A similar provision permitting federal funds to be used for schoolwide improvements was added to the statute in 1978. See Education Amendments of 1978, Pub. L. No. 95-561, § 133, 92 Stat. 2176; see also Education Consolidation and Improvement Act of 1981, Amendment, Pub. L. No. 98-211, § 3, 97 Stat. 1414 (1983). The Department of Education informs us that it never permitted religious schools to take advantage of the schoolwide improvement provisions of the old law.

We have lodged with the Clerk and served on the parties a copy of the Department of Education's current policy guidance on programs under Title I, Part A of the Elementary and Secondary Education Act, as amended. We have also lodged and served copies of the 1993 Department of Education assessment of Title I services delivered to nonpublic school students and the 1989 General Accounting Office study of the costs of compliance with *Aguilar*, discussed at pp. 37-39, *infra*.

final decisions with respect to the services to be provided to eligible private school children," 34 C.F.R. 200.11(b)(3).

2. In 1978, respondents[5] brought this action to challenge, as violative of the Establishment Clause of the First Amendment, the use of Title I funds to pay the salaries of public school teachers to provide secular remedial instruction to religious school students in their own schools. This Court held that such use of Title I assistance did violate the Establishment Clause, because of the risk of entanglement between government and religious authorities. *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

The Court noted that "[t]he professionals involved in the program are directed to avoid involvement with religious activities * * * and to bar religious materials in their classrooms," and that "the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols." 473 U.S. at 407. The Court held, nonetheless, that the public school system's supervisory efforts necessary to ensure that the instruction retained a purely secular content "inevitably results in the excessive entanglement of church and state." *Id.* at 409. The Court concluded that "[a]gents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes," and "the religious school must obey these same agents when they make determinations as to what is and what is not a 'religious symbol' and thus off limits in a Title I classroom." *Id.* at 413.

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[5] The Secretary of Education is also a respondent in this case under this Court's Rule 12.6, but he supports the position of the petitioners. Therefore, our references herein to "respondents" are to the private respondents.

On remand from this Court, the district court entered an injunction prohibiting the Secretary of Education and the Chancellor of the Board of Education of the City of New York from using Title I funds for instructional and counseling services inside religious schools. Pet. App. 14a-16a. It is that injunction from which petitioners sought relief under Rule 60(b) of the Federal Rules of Civil Procedure.

3. After this Court's decision in *Aguilar*, local school districts adjusted their practices to continue providing Title I services to private religious school students, albeit in settings other than inside religious schools. School districts have provided Title I services to religious school students in public school classrooms, at leased sites, through computer-assisted instruction, and in mobile units parked near or on religious school property. The Secretary of Education has required that school districts pay for the administrative costs of such alternative delivery systems from their Title I funds before using any such funds for core instructional and counseling services. See 34 C.F.R. 200.27(c).[6]

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[6] Both the alternative delivery methods and the Secretary's requirement that costs for compliance with the Court's decision in *Aguilar* be paid for "off the top" of Title I funds have been upheld against several statutory and constitutional challenges. See *Pulido* v. *Cavazos*, 934 F.2d 912 (8th Cir. 1991); *Barnes* v. *Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Board of Educ. of Chicago* v. *Alexander*, 983 F.2d 745 (7th Cir. 1992); *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995). Many of the same practices upheld in the foregoing cases now exist in New York City, see 96-553 Pet. App. A43-A70, ¶¶ 24-77, and were upheld against constitutional challenge in *Committee for Public Education and Religious Liberty* v. *Secretary, United States Department of Education*, 942 F. Supp. 842 (E.D.N.Y. 1996). Unrelated challenges to the City's provision of other forms of educational aid to private school children are still pending in the district court in that case.

The economic costs of delivering Title I services to students enrolled in religious schools at sites other than the religious schools themselves are considerable. The Secretary of Education has expressed concern that school districts "have expended hundreds of millions of dollars on non-instructional costs in order to comply with [the Court's decision in *Aguilar*]," Pet. App. 18a, and that New York City was required in one fiscal year alone to spend $6 million on compliance that could otherwise have been used for the core instructional and counseling purposes of Title I, *ibid.* The Secretary has also noted that, although Title I services have been provided to religious school students, since *Aguilar*, through "computer-assisted instruction in private schools and, in appropriate circumstances, parking mobile vans on or near private school property," *id.* at 18a-19a, there has been criticism that "even the alternative arrangements that have developed as a result of [*Aguilar*] are not the most educationally effective methods for providing Title I services," *id.* at 19a. The Secretary of Education therefore supported efforts to have the *Aguilar* decision reconsidered. *Ibid.*

4. In October and December 1995, petitioners filed motions under Federal Rule of Civil Procedure 60(b) for relief from the injunction entered by the district court on remand from this Court. The district court denied the motions. Pet. App. 1a-10a.

The district court first ruled that a Rule 60(b) motion was a proper mechanism for petitioners to present their request for relief from the September 1985 injunction. Pet. App. 7a-10a. The court acknowledged that "Rule 60(b) may not be used as a substitute for appeal," but it found it "plain" that, in this case, a Rule 60(b) motion "does not offend that rule." *Id.* at 7a. After discussing the separate views of several Justices of this Court about *Aguilar* expressed in *Board of Education of Kiryas Joel Village*

School District v. *Grumet*, 512 U.S. 687 (1994), the district court observed that "it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now." Pet. App. 7a-8a. In such extraordinary circumstances, the district court concluded, allowing petitioners "to resuscitate pursuant to Rule 60(b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done." *Id.* at 8a.

Addressing the "law of the case" doctrine, the district court noted that courts may depart from that rule for a "compelling reason" such as an "intervening change of law." Pet. App. 8a. The court thus accepted that, if petitioners were able to show "a sea change in the law" since this Court's decision in *Aguilar*, the law of the case doctrine would not preclude relief under Rule 60(b). *Ibid.* The court found further that the motion was not untimely, and that respondents would not suffer any cognizable prejudice as a result of any delay in bringing the Rule 60(b) motion. *Id.* at 8a-9a. And the court expressly found that a motion for relief from the injunction was "far preferable" to requiring the school district to challenge the judgment by placing itself in contempt by disobeying the injunction. *Id.* at 9a.

Ultimately, however, the court declined to afford petitioners relief from the judgment. The court observed that "[t]here may be good reason to conclude that *Aguilar*'s demise is imminent, but it has not yet occurred." Pet. App. 10a. The court also found it doubtful that it could properly anticipate any such decision by this Court to reverse its own decision in this case. *Ibid.* The district court suggested, however, that "there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is

struggling with the consequences of the Supreme Court's decision." *Ibid.*

The court of appeals affirmed, in a summary order, "substantially for the reasons" stated in the district court's decision. Pet. App. 13a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federally funded Title I education program is at the heart of the Nation's commitment to equal educational opportunity. That program establishes a federal-state partnership to lift the educational attainment of children in low-income areas who are failing, or at risk of failing, a State's student performance standards, by giving those students supplementary educational services. Congress required local educational agencies (LEAs) that receive Title I funds to offer Title I services "equitably" to students in both public and nonpublic schools. The judgment of most school administrators, as well as the Secretary of Education, is that the most educationally sound and cost-efficient method of delivering such services to religious school students (as with public school students) is to do so in their own schools.

That sensible and effective method of delivering Title I services to students in religious schools, however, has been foreclosed since this Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985). Even though Title I services must be secular and neutral, must be delivered to students in all cases by public employees (not religious school teachers), and must be designed to supplement, and not supplant, the nonpublic school's instructional program, the Court concluded in *Aguilar* that the very safeguards established to prevent any use of Title I services to advance religion themselves created a risk of "entanglement" of church and state. As a result, LEAs serving children enrolled in religious schools are required to

spend substantial sums on less effective, improvised methods of instruction, such as computer-assisted instruction, instruction at public schools where the students have been transported, or teaching in "mobile" sites such as rented vans. The money spent on administering these alternative delivery systems is money that would be available for direct instruction for both public and private school students, but for the *Aguilar* decision.

Our submission is straightforward: *Aguilar* should be overruled because there is no serious danger of entanglement of church and state when public school teachers deliver secular services to students in a supplementary program under circumstances carefully designed to ensure that the instruction is not influenced by the surroundings of a religious school. Overruling *Aguilar* is consistent with principles of *stare decisis*, because that decision is inconsistent with the bulk of the Court's entanglement jurisprudence and has significant costs. Further, this case is an appropriate vehicle in which to reconsider *Aguilar*, because this Court has the authority to reexamine that decision on review of the lower courts' denial of motions for relief from judgment under Federal Rule of Civil Procedure 60(b). Principles of finality of judgments do not deprive this Court of the authority to reconsider its earlier decision when a prospective injunction remains in effect. And although we would not lightly suggest to the Court that it depart from its own law of the case, we believe that, in light of the serious, adverse effect on equal educational opportunity occasioned by *Aguilar*, there is a compelling case for overruling that decision here.

I. A. The decision in *Aguilar* reflected an approach to the problem of entanglement that was not consistent with most of the Court's previous decisions on that question. In cases such as *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Hunt* v.

McNair, 413 U.S. 734 (1973), and *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), the Court had emphasized that government is not forbidden from cooperating with religiously affiliated institutions to accomplish secular objectives. When government does work with such institutions, there must be some method of ensuring that government does not lend its aid to the advancement of religious doctrine, but the government does not necessarily enmesh itself with the affairs of a church merely because it attempts to keep its own program secular in the context of such cooperation. Certainly there is no reason to presume that the government will disregard or fail at its constitutional obligations. Rather, the danger of such entanglement must be affirmatively shown in the record or found to arise because of the inherent nature of the specific church-state relationship at issue. For even when church and state cooperate, the government will often be able to keep the two separate through routinized and readily administered methods requiring no intrusive or continuing supervision of a religious institution. This is such a case.

B. The Court in *Aguilar* held, to the contrary, that an impermissible risk of entanglement would be present if public school teachers delivered supplementary secular educational services inside religious schools. The Court concluded that the oversight of Title I teachers necessary to insulate their teaching from the influence of the surrounding religious school would create excessive entanglement. The Court also stated that the administrative contacts between public and religious school personnel necessary to operate the program would be impermissibly entangling. Those conclusions were incorrect and stemmed from an analytical approach that was not consistent with the more practical and restrained approach reflected in virtually all of the Court's other decisions.

The administrative contacts between public and religious school personnel involved in the operation of the Title I program are only the routine contacts necessary to make the program function effectively as an educational program, no more extensive than the kinds of contacts the Court had previously held to be constitutional. Moreover, such contacts are necessary even when religious school children receive Title I instruction in public school classrooms, which is plainly constitutional.

The oversight of public school teachers delivering Title I services also presents no danger of entanglement. The Establishment Clause does not prevent public school administrators from supervising their own personnel to make sure that public instruction remains secular, whether inside or outside a religious school. Because Title I services are delivered only by public personnel, there is no basis for a concern that the public schools will become involved in supervising the content of the *religious* school's curriculum or the manner in which that curriculum is delivered by *religious* school teachers. And unlike the *Lemon* case, which involved state aid to religious school teachers, there is also no reason to hypothesize that public school teachers under strict secular control will become influenced, wittingly or unwittingly, by the surroundings of a religious school so as to give their instruction a sectarian tinge.

The program invalidated in *Aguilar* was similar to the program invalidated in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), but the analytical approach in *Meek* is also inconsistent with most of the Court's decisions. *Meek* need not, however, be read as establishing a rigid rule against instruction by public school teachers inside religious schools. *Meek* is also distinguishable on its facts, for the program at issue there lacked Title I's extensive guidance safeguards. Should the Court disagree, however, that

Meek is distinguishable, it should also overrule that portion of *Meek* that is relevant to this case.

C. Since *Aguilar*, the Court has returned to its previous practical and restrained approach to entanglement claims. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Court, in rejecting an Establishment Clause challenge to a federal statute permitting grants to religiously affiliated institutions but providing for supervision to ensure that the grants were not used for sectarian purposes, stressed that the situation had not been shown to involve any significant danger of entanglement in the course of such supervision. *Id.* at 615. In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), the Court upheld the use of public funds to pay for a sign-language interpreter to accompany a deaf child in classes at a Catholic high school, and rejected a broad reading of *Meek*, stating that there is "no absolute bar to the placing of a public employee in a sectarian school." *Id.* at 12-13. Finally, in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994), five Justices joined separate opinions criticizing the *Aguilar* decision and suggesting that it should be reconsidered. Those post-*Aguilar* decisions indicate that *Aguilar* is not consistent with the Court's Establishment Clause jurisprudence, and should be overruled.

D. The lack of any real danger of entanglement in Title I stands in sharp contrast to the serious, adverse consequences to equal educational opportunity that *Aguilar* has engendered. The Department of Education, the General Accounting Office, and House and Senate Committees have all concluded that *Aguilar* requires school districts to spend considerable sums on administrative costs made necessary only by *Aguilar*, sums that would otherwise be available for instructional purposes. Further, the alternative instructional methods available for nonpublic school

children after *Aguilar* (mobile site instruction, computer instruction, transportation to public schools) are all less effective than face-to-face instruction at their own schools. Those costs are not required by the Establishment Clause, and their serious consequences for education in this country provide a compelling case for overruling *Aguilar*.

II. Federal Rule of Civil Procedure 60(b) is a proper vehicle for petitioners to obtain relief from the district court's injunction based on this Court's decision in *Aguilar*. Rule 60(b) incorporates a well-established exception to the principle of finality of judgments, permitting a court to vacate a prospective injunction based on changes in the governing law. While the lower courts in this case were bound to follow this Court's controlling decision in *Aguilar*, this Court is not so bound and may reconsider its decision on review of the lower courts' correct refusal to depart from *Aguilar*. Further, this Court's reexamination of *Aguilar* on review of the denial of a Rule 60(b) motion may be the only practical and suitable means for reconsideration of that decision, since all lower courts are in any case bound by that decision, and the other possible mechanisms for this Court to reconsider the case all have serious defects. There is little reason for concern that use of the Rule 60(b) mechanism in this case will lead to abuse in future cases, because meritless attempts to gain reconsideration of precedent will be answered appropriately. And, in this case, the record presented to the courts below in the context of petitioners' Rule 60(b) motions is adequate to permit reconsideration of *Aguilar*.

ARGUMENT

I. *AGUILAR* v. *FELTON* SHOULD BE OVERRULED.

The decision to overrule a precedent of constitutional law is, of course, not to be taken lightly, particularly in an area as sensitive as that of the Establishment Clause. In our view, however, there is a compelling case for the Court to reverse its decision in *Aguilar* v. *Felton*. The outcome in *Aguilar* was not dictated by the Court's prior decisions in the area. Indeed, that decision's reliance on hypothetical concerns about the need for intensive supervision to ensure the secularity of a publicly administered program—concerns that had never arisen in years of actual administration of Title I in New York City—was inconsistent with most of the Court's prior entanglement decisions, which had stressed the need for a careful and "real world" evaluation of the administration of any program involving public aid to students at religiously affiliated educational institutions. *Aguilar*'s approach is also inconsistent with subsequent decisions of this Court, which have returned to that more practical and restrained approach. The consequences of the *Aguilar* decision are, moreover, very serious. In the judgment of the Secretary of Education, the less effective pedagogical methods available for private school students (such as teaching in rented vans, or remote computer-assisted instruction) and the large financial costs incurred in those methods have had a serious, adverse effect on the ability of students, at both public and private schools, to receive the needed remedial educational aid. See Pet. App. 17a-19a.

Accordingly, our submission is straightforward: *Aguilar* v. *Felton* should be overruled. *Aguilar* is an outlier in this area of constitutional law, not consistent with the

general thrust of the Court's other precedents in this field. No broad-ranging reconsideration of the Court's Establishment Clause decisions is necessary in order to overrule *Aguilar*, even on the narrow issue of "entanglement."

Our submission is consistent with the Court's long-standing approach to *stare decisis* in constitutional cases. Even as the Court has emphasized that adhering to precedent "'is usually the wise policy,' * * * when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). The same is true when a decision has been "bypassed by later decisions," see *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848, 861 (1996), or when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," *Planned Parenthood* v. *Casey*, 505 U.S 833, 855 (1992). Those circumstances are present here, for *Aguilar* rested on an approach to the problem of entanglement that (mistakenly, in our view) took little account of the real facts of the case, and failed to give adequate consideration to the substantial educational and economic costs of the decision. In those respects, *Aguilar* was a marked departure from the principal thrust of the Court's entanglement decisions. Cf. *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1127-1128 (1995). And there is no reliance interest counseling continued adherence to *Aguilar*, for it is not the kind of decision that leads to private commercial ordering, the development of personal and social relationships, or patterns of "thinking and living." Cf. *Casey*, 505 U.S. at 856. Accordingly, *stare decisis* does not prevent the overruling of *Aguilar*.

A. The Court's "Entanglement" Jurisprudence Before *Aguilar* Required A Real, Rather Than Hypothetical, Danger Of Surveillance Of Religious Institutions By Governmental Authorities To State An Establishment Clause Violation

Under *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), governmental action is consistent with the Establishment Clause if: (1) it has a secular legislative purpose; (2) it has a principal or primary effect that neither advances nor inhibits religion; and (3) it does not require excessive government entanglement with religion. In *Aguilar*, the Court held that the challenged aspects of the Title I program violated the Establishment Clause with respect to the third prong, "excessive entanglement." 473 U.S. at 409-414. In our view, that decision cannot now be reconciled with the Court's Establishment Clause jurisprudence, and should be overruled.[7]

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[7] It is indisputable that Title I has a secular purpose, and respondents have not argued otherwise. See *Aguilar*, 473 U.S. at 423 (O'Connor, J., dissenting) ("no party in this Court contends that the purpose of the statute or of the New York City Title I program is to advance or endorse religion"); cf. *Lemon*, 403 U.S. at 613; *Committee for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973). Respondents have suggested that, under *School District of the City of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985), the Title I program is invalid for having the primary effect of advancing religion. Br. in Opp. 16-19. That submission should be rejected. The overwhelmingly secular effect of Title I was so clear in *Aguilar* that the Court bypassed the "primary effect" prong of the *Lemon* test entirely and discussed only entanglement. See 473 U.S. at 423-424, 426 (O'Connor, J., dissenting). But see *id.* at 417-418 (Powell, J., concurring).

Title I differs from the "Shared Time" program at issue in *Ball* in several crucial respects that highlight the complete secularity of Title I. The Shared Time program involved public school teachers in the regular course work of the religious school, under the overall direction of the religious school; it thus presented the danger that public school

1. Since *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), the Court has indicated that governmental action with a secular purpose may violate the Establishment Clause if "the end result—the effect—is * * * an excessive government entanglement with religion." *Id.* at 674. One danger of such entanglement, as the Court noted in *Walz*, is that joint religious and secular involvement in the administration of programs may require "official and continuing surveillance" of the religious institutions, to the detriment of the latter's independence from the state. *Id.* at 675; see *id.* at 691 (Brennan, J., concurring) (danger arises from "extensive state investigation into church operations and finances"). Another concern, noted by Justice Harlan, is that government participation in programs administered by religious institutions may lead to political "fragmentation" as the polity divides along religious lines. That danger is most likely when government inserts itself into "details of administration and

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teachers would significantly relieve the religious schools of their responsibility for teaching secular subjects, freeing those schools to focus their resources and energies on religious activities. See 473 U.S. at 377 ("[t]he nonpublic school administrators then decide which courses *they want to offer*") (emphasis added); *id.* at 388 ("Shared Time instructors are teaching academic subjects in religious schools in courses virtually indistinguishable from the other courses offered during the regular religious schoolday."). See also *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993) (noting that program in *Ball* provided "direct grants of government aid [and] relieved sectarian schools of costs they otherwise would have borne in educating their students"). Finally, the Shared Time program lacked Title I's extensive safeguards against use of the program to advance religion. *Ball*, 473 U.S. at 387 ("[N]o attempt is made to monitor the Shared Time courses for religious content."). Title I, by contrast, involves supplementary services provided by public school teachers under the supervision of public school authorities with safeguards to ensure the program's secularity.

planning" of a religious organization's program. *Id.* at 695 (separate opinion).

At the same time, the Court has stressed that religiously affiliated organizations play an important role in the pluralistic aspect of American life, not least in achieving the secular benefits of education. *Walz*, 397 U.S. at 673-674; *Board of Educ.* v. *Allen*, 392 U.S. 236, 247-248 (1968). It is not the case that religious institutions exist to accomplish only sectarian objectives, or that such sectarian objectives are inextricably intertwined with nonreligious ones. See *id.* at 248. Accordingly, government need not refuse to lend all support to the secular objectives of religious institutions; rather it may, as part of a broader program including both religious and nonreligious institutions, lend at least some support to the secular education of students in religious schools, as long as "the activity does not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom.'" *Id.* at 249 (Harlan, J., concurring). See also *Everson* v. *Board of Educ.*, 330 U.S. 1, 17-18 (1947); *Bowen* v. *Kendrick*, 487 U.S. 589, 607 (1988) ("Nothing in our previous cases prevents Congress from * * * recognizing the important part that religion or religious organizations may play in resolving certain secular problems.").

"The test is inescapably one of degree." *Walz*, 397 U.S. at 674. And—crucially for this case—it is not to be *presumed* that public authorities delivering secular services will be unable to distance themselves from sectarian aspects of religious institutions, or that they will not honestly discharge their constitutional obligations. *Allen*, 392 U.S. at 245; see *Lemon*, 403 U.S. at 617; *Hunt* v. *McNair*, 413 U.S. 734, 745-749 (1973); *Committee for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 660-661 (1980). Rather, to create an Establishment Clause viola-

tion, the danger of entanglement from "the cumulative impact of the entire relationship" (*Lemon*, 403 U.S. at 614) must "inhere[] in the situation," and must be shown in the record to exist "to a substantial degree" (*id.* at 617).

In particular, the problem of entanglement arises only if there is a "realistic likelihood" that the administration of a program will require extensive supervision of the operations of a religious institution by state authorities. See *Hunt*, 413 U.S. at 747 (no violation absent "realistic likelihood" of supervision of religious institution by state authorities); *Tilton* v. *Richardson*, 403 U.S. 672, 686-688 (1971) (plurality opinion). And if a program does not involve direct aid to pervasively sectarian institutions, which would require continuing and detailed supervision to ensure that the funds are applied only to secular purposes, "the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened." *Id.* at 687; see *Regan*, 444 U.S. at 659-660.

2. Before *Aguilar*, the Court stressed that no constitutional violation exists absent an actual, rather than hypothetical, danger of entanglement between religious and secular authorities. In *Hunt* v. *McNair*, for example, the Court rejected the contention that the use of revenue bonds for the financing of a religiously affiliated college presented a danger of entanglement because of the possibility that the state educational authority might become "involved in the day-to-day financial and policy decisions of the [c]ollege." 413 U.S. at 747. In light of a state court decision circumscribing the state agency's authority to ensuring only that fees charged by the college were sufficient to meet bond payments, the Court refused to invalidate the program on the hypothetical possibility that a college might default on the bonds, leading the agency to foreclose and operate the college. *Id.* at 748-749; see *id.* at

749 ("The specific provisions of the Act * * * confine the scope of the assistance to the secular aspects of this liberal arts college and do not foreshadow excessive entanglement.").[8]

Likewise, in *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976), the Court concluded that a program of grants to private colleges, made subject to the restriction that the funds not be used for sectarian purposes, had not been shown to present any actual danger of entanglement between church and state.[9] Although there was a "process of annual interchange—proposal and approval, expenditure and review"—between the colleges and the state funding authority (*id.* at 762) (opinion of Blackmun, J.), the fact of overriding significance was "the ability of the State to identify and subsidize separate secular functions carried out at the school," without on-the-site inspections *of the activities of the religious college* being necessary to prevent diversion of the funds to sectarian purposes. *Id.* at 765 (opinion of Blackmun, J.). Since both the recipient colleges and the state authorities were "capable of separating secular and religious functions" without undue interaction (*id.* at 766) (opinion of Blackmun, J.), the program was upheld.

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[8] Contrast *Nyquist*, 413 U.S. at 794 (finding that direct financial assistance to religious schools carried "grave potential" of continuing political strife); *Levitt* v. *Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) (finding a "substantial risk" that direct financial assistance to religious schools for student examinations would advance religion, because "the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities").

[9] Although only three Justices joined the lead opinion in *Roemer*, Justice White and then-Justice Rehnquist concurred in the judgment on broader grounds, agreeing that no danger of entanglement was present and suggesting that there is no separate "entanglement" doctrine under the Establishment Clause. 426 U.S. at 767-770.

In *Wolman* v. *Walter*, 433 U.S. 229 (1977), the Court upheld a practice under which state personnel supplied private schools with the same standardized tests used by students in public schools, and scored those tests as well. Since the private schools did not control the content or the result of the tests, there was no need for state supervision of religious schools to ensure the secular content of the tests, and therefore no actual danger of entanglement. *Id.* at 240-241 (plurality opinion). Similarly, in *Regan*, the Court upheld the use of state funds to reimburse private schools for the administration and scoring of standardized tests that the state supplied and required the schools to administer, emphasizing that the reimbursement process, including auditing, was "straightforward and susceptible to * * * routinization." 444 U.S. at 660.

The only decision before *Aguilar* suggesting a different approach towards entanglement concerns was *Meek* v. *Pittenger*, 421 U.S. 349 (1975). *Meek* invalidated a practice by which state educational authorities would "supply professional staff * * * to the nonpublic schools * * * when 'requested by nonpublic school representatives,'" to deliver secular "auxiliary services" to private school students. *Id.* at 367. The Court suggested that the State was required to be "certain" that its teachers would not advance the religious mission of the schools where they were sent, and it found at least a possibility of "inadvertent fostering of religion" even in the delivery of secular educational services by public employees when surrounded by the environment of a sectarian school, *id.* at 370-371. The Court also declined to rely on the "good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." *Id.* at 369. It suggested that such a presumption of good faith was precluded by a companion case to *Lemon*, which had invali-

dated the use of public funds to supplement the salaries of religious school teachers who (unlike the auxiliary teachers in *Meek*) were subject to the control and discipline of the religious school's authorities. *Id.* at 369-370; cf. *Lemon*, 403 U.S. at 617-619. *Meek* is, therefore, somewhat inconsistent with the Court's other entanglement decisions. See pp. 30-33, *infra* (discussing *Meek*).

B. *Aguilar* Was A Departure From Most Of The Court's Previous Entanglement Cases, And Incorrectly Decided That Delivery Of Title I Services In Religious Schools Presents A Danger Of Entanglement

In *Aguilar*, the Court held unconstitutional the use of Title I funds to send public school teachers into religious schools to provide remedial instruction with respect to purely secular subjects. The Court's ruling was premised on two considerations. First, although the Court noted that New York City's Title I program had safeguards to prevent public funds from being used, "intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school," it concluded that those safeguards themselves created a constitutional difficulty, in that the supervision necessary to ensure that those impermissible effects would not occur "inevitably results in the excessive entanglement of church and state." 473 U.S. at 409. The Court believed that "pervasive monitoring by public authorities in the sectarian schools" was necessary to "ensure the absence of a religious message" in the Title I services. *Id.* at 412-413.

Second, the Court concluded that the "administrative cooperation that is required" between public and religious school personnel in the everyday implementation of the program "entangles church and state in still another way that infringes interests at the heart of the Establishment

Clause." 473 U.S. at 413. As part of that cooperation, "[a]dministrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding that program." *Ibid.* Furthermore, "the program necessitates 'frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved.'" *Ibid.*[10]

We address those considerations in reverse order. First, the administrative contacts involved in implementation of Title I are no greater than the routine contacts that the Court had, in the past, recognized as permissible, and are necessary even if the Title I instruction takes place away from religious schools—in which case no Establishment Clause problem is present. Second, even under the Court's Establishment Clause jurisprudence before *Aguilar*, the Court should not have found excessive entanglement on the basis of the hypothetical (indeed nonexistent) possibility that intrusive supervision of the religious school would be necessary to ensure that public school teachers did not deliver a religious message. In addition, *Aguilar* is not consistent with subsequent Establishment Clause decisions, which have returned to the pre-*Aguilar* requirement of an actual danger of *entanglement*—not contact—between church and state.

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[10] Justice Powell also suggested that the "aid to religion" he perceived in Title I carried a "risk of political divisiveness," in that "any proposal to extend direct governmental aid to parochial schools alone is likely to spark political disagreement from taxpayers who support the public schools, as well as from nonrecipient sectarian groups, who may fear that needed funds are being diverted from them." 473 U.S. at 416-417 (concurring opinion).

1. This Court has made clear that "[s]eparation [between church and state] cannot mean absence of all contact." *Walz*, 397 U.S. at 676. Some contact is acceptable, indeed inevitable. See *Lemon*, 403 U.S. at 625. When the administrative contacts needed to carry out a secular program are "straightforward and susceptible to * * * routinization," there is no excessive entanglement on the face of the program, and no reason to presume that such entanglement will inevitably occur in its application. *Regan*, 444 U.S. at 660-661 (finding no entanglement in contacts necessary to administer a program of state reimbursement to religious schools for administering and grading state-prescribed examinations). Thus, in *Walz*, 397 U.S. at 674-676, the Court found no excessive entanglement in the routine (and inevitable) contacts between church and state over the administration of the local tax code exemptions. See *Lemon*, 403 U.S. at 614 (emphasizing that there was no entanglement in *Walz* even though the State "had a continuing burden to ascertain that the exempt property was in fact being used for religious worship"). Nor was entanglement found in *Mueller* v. *Allen*, 463 U.S. 388 (1983), which upheld state tax deductions for textbooks, even though state officials were required to disallow deductions for instructional books and materials to be used for the teaching of religious doctrine. Making such straightforward decisions between religious and nonreligious materials, held the Court, did not amount to the "comprehensive, discriminating, and continuing state surveillance" that constitutes impermissible entanglement. *Id.* at 403.

The "contacts" between state officials and nonpublic school administrators in the delivery of Title I services are also straightforward and routine. Those contacts (both before and after *Aguilar*) generally fall into three categories: (1) disseminating information about Title I to

private school administrators, (2) consulting with private school officials about the Title I services to be provided, and (3) resolving "individual student needs, problems encountered, and results achieved." *Aguilar*, 473 U.S. at 413; see J.A. 59, 647. Those contacts give religious school officials no control over the content of the program (see J.A. 647; 34 C.F.R. 200.11(b)(3); *Wheeler* v. *Barrera*, 417 U.S. 402, 424 (1974)), nor do they involve Title I personnel in the affairs of the religious schools. The Title I supervisors have only casual and periodic contact with nonpublic school administrators and little, if any, contact with nonpublic school teachers. Title I supervisors review and evaluate only the performance of the Title I teacher in the Title I classroom, and neither the religious school program nor its instructional material is subject to public supervision. See generally J.A. 59-63; see also J.A. 50-51, 52-55, 647. Before *Aguilar*, the public instructors who went into religious schools were supervised by field personnel, who attempted to make no more than one unannounced visit per month. The field supervisors, in turn, reported to public program coordinators, who also paid very occasional unannounced supervisory visits to monitor Title I classes in the religious schools. See *Aguilar*, 473 U.S. at 407; J.A. 645 (similar number of supervisory visits after *Aguilar*). Those contacts are no more intrusive than, and are equally as routine as, the contacts upheld as permissible by the Court before *Aguilar* in *Walz*, *Regan*, and *Mueller*.[11]

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[11] This Court noted in *Aguilar* that the public school professionals involved in the Title I program were directed to avoid involvement with religious activities conducted within the private schools and to bar religious materials in their classrooms. All materials and equipment used in the programs funded under Title I were supplied by public school personnel and were used solely in those programs. The public school personnel were also solely responsible for the selection of

Moreover, the contacts involved are inevitably required however Title I services are provided to nonpublic school students—whether in religious schools, public schools, mobile units, or through computer-assisted instruction. At some point, public and private school teachers must discuss the precise needs of individual students and the nature of the public services to be delivered to the students. Under the logic of *Aguilar*'s emphasis on contacts, however, the decision would bar any implementation of Title I for religious school children. Yet clearly, the Court had no such result in mind, for it had already upheld the provision of state-funded counseling, therapeutic, and remedial services to religious school students away from their schools. *Wolman*, 433 U.S. at 247-248; see also *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1460-1461 (9th Cir. 1995); *Aguilar*, 473 U.S. at 418-419 (Powell, J., concurring); *id.* at 430-431 (O'Connor, J., dissenting). The routine administrative contacts necessary to make Title I services available to religious school students cannot be a sufficient basis for invalidation of the program, even insofar as the services are delivered inside religious schools.

2. a. The federal government and New York City have recognized that Title I services, wherever they are delivered, must be entirely secular in content and must be separate from (and supplementary to) the ordinary instruction of a religious school. The services are therefore designed and delivered by public personnel, who have only administrative and routinized contacts with the nonpublic

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the students. Additionally, they were informed that contact with private school personnel should be kept to a minimum. Finally, the administrators of the religious schools were directed to clear the classrooms used by the public school personnel of all religious symbols. *Aguilar*, 473 U.S. at 407. Those principles also apply to the current program. See J.A. 644-648.

school authorities. But for *Aguilar*, the services would be delivered to certain students inside a religious school because that is where those students are for most of the day. The only question is whether the mere fact that Title I services might be provided inside religious school buildings, by itself, presents a serious danger of entanglement.

The Court in *Aguilar* believed that it would take a "comprehensive system of supervision" to "ensure that teachers in parochial schools were not conveying religious messages to their students," and that such "a comprehensive system * * * would inevitably lead to an unconstitutional administrative entanglement between church and state." See 473 U.S. at 410. The Court relied in part on *Lemon* for that conclusion. *Id.* at 410, 412. *Lemon*, however, involved salary supplements to *religious* school teachers; the Court in *Lemon* observed that those teachers, who had been hired by, and were under the discipline of, a religious authority, were inherently likely to infuse their instruction with religious content (wittingly or not). 403 U.S. at 618-619. Comprehensive monitoring was required to prevent religious school teachers from giving religious content to their own school's instructional program. That monitoring, however, was necessary not because the instruction occurred inside a religious school building, but because the instruction was offered by religious schools and delivered by teachers of those schools.

By contrast, Title I services are delivered directly to students by *public school* teachers under the supervision of *public school* authorities. Those authorities' supervision of their own personnel entails no relationship between the government and religious authorities and, as a result, no intrusion of the government into church matters (including the religious school's instructional content). See *Aguilar*, 473 U.S. at 421 (O'Connor, J., dis-

senting) ("The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion."). The supervision required is no different, in principle, from the supervision necessary to ensure that teachers in the public schools comply with this Court's school prayer decisions or, indeed, to prevent impermissible religious effects even when Title I classes for religious school students are taught in public school classrooms. The Constitution simply does not prohibit such "entanglement" between the government and its own public employees. See *Wolman*, 433 U.S. at 246-248.

In addition, the "unannounced supervisory visits" by public school authorities described by the Court in *Aguilar* (see 473 U.S. at 407) were no more intrusive than the monitoring occasioned by many public regulatory programs, such as state accreditation of schools and compliance with fire code requirements; and in any event, the purpose of those visits was to monitor the public instructors, not the religious school teachers. The religious school merely supplied a classroom in specified condition and allowed access to that classroom by public school teachers and supervisors; there was accordingly no reason for a Title I supervisor to examine anything other than that classroom. Not surprisingly, therefore, there was no indication in the record of any friction caused by the occasional visits by Title I supervisors to Title I classrooms.[12]

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[12] The Court also expressed concern about Title I supervisors "prowling the halls" of religious schools. 473 U.S. at 414. That concern, we submit, was entirely theoretical. The *Aguilar* record reflects no such "prowling," even though the Title I program had operated in New York City for almost two decades; there was no showing that Title I required a "permanent and pervasive state presence in the sectarian schools," *id.* at 412-413. The Court also suggested that, because classrooms were required to be cleared of religious symbols, there might be

At bottom, then, the decision in *Aguilar* must be based on the possibility that public school teachers might internalize their surroundings when they are inside religious schools, and that supervision of those teachers would therefore be necessary "to guard against the infiltration of religious thought." 473 U.S. at 413. We submit that—contrary to the situation in *Lemon*—there was simply no basis in the *Aguilar* record (or elsewhere) for any concern that professionally trained public school teachers, under secular control, delivering secular services in a school whose religion they might not even share (see J.A. 341, 642-643) would succumb to unconscious pressure to deliver a religious message in their instruction. To invalidate a remedial program on such speculative concerns is contrary to the practical approach of virtually all of the Court's Establishment Clause decisions.

b. The Court in *Aguilar* suggested (473 U.S. at 410, 412-413) that the case was controlled by *Meek* v. *Pittenger*, 421 U.S. 349 (1975). The auxiliary services program invalidated in *Meek* is similar in several respects to Title I, and *Meek* did (like *Aguilar*) find a danger of entanglement even in "the absence of any record support for the notion that public school teachers would attempt to inculcate religion simply because they temporarily occupied a parochial school classroom, or that such instruction would produce political divisiveness." See *Aguilar*, 473 U.S. at 427 (O'Connor, J., dissenting). Thus, the analytical

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friction between public and religious school authorities "as to what is and what is not a 'religious symbol.'" *Ibid.* In fact, the question of "what is a religious symbol" would not require *ongoing* interaction between public and religious school administrators. Once agreement is reached about the removal of certain symbols from a classroom, the question need not be revisited. Cf. *Mueller*, 463 U.S. at 403 (no danger of entanglement in state tax authorities' duty to disallow deductions for religious materials).

approach in *Meek* to claims of entanglement, like that in *Aguilar*, is inconsistent with the Court's other decisions in this area.[13]

Nonetheless, the Court need not read *Meek* as resting on a *per se* rule that all secular instruction delivered directly to students by public personnel inside religious schools is unconstitutional. Just one year before *Meek*, in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), the Court was faced with the question of the constitutionality, in the abstract, of such a Title I program. In that case, an LEA had declined to offer instructional services in religious school classrooms, arguing that to do so would violate the Establishment Clause. The Court declined to resolve that issue, and stated that the question should be decided on the basis of "a careful evaluation of the facts of the particular case." *Id.* at 426. The Court observed that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." *Ibid.*

Five Terms after *Meek*, in *Committee for Public Education & Religious Liberty* v. *Regan*, the Court explicitly rejected a broad interpretation of *Meek*:

> *Meek* * * * is said to have held that any aid to even secular educational functions of a sectarian school is forbidden, or more broadly still, that any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of

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[13] *Meek* relied on *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), aff'd summarily, 417 U.S. 961 (1974). *Marburger*, however, involved a program in which public funds were provided to nonpublic schools to enable them to hire public school personnel for remedial services that the nonpublic schools deemed appropriate. Thus, when the *Marburger* program operated in the religious schools, it was under the control of the religious schools rather than the public schools.

> its activities. * * * [T]hat case was simply not understood by this Court to stand for [such a] broad proposition.

444 U.S. at 661. Similarly, *Meek* does not require a broad reading that instructional services delivered by public school teachers inside religious schools are inherently suspect.

Further, even if *Meek* was correctly decided on its facts (a question the Court need not reach here), there are several important differences between *Meek* and this case. First, the Title I program is governed by specific regulations and guidelines governing services to private school children that are made known to Title I personnel and the nonpublic schools as well. See J.A. 50-55, 643. This has the beneficial effect of routinizing the conduct of the program and eliminating the need for *ad hoc* judgments about the relations between the religious school and the Title I program. See *Regan*, 444 U.S. at 660 (upholding program where it is "straightforward and susceptible to * * * routinization"). In *Meek*, by contrast, the principles for administering the auxiliary services program had not been so routinized, and so there was a potential for "controversy between the Commonwealth and religious authorities over the extent of the teachers' responsibilities and the meaning of the legislative and administrative restrictions on the content of their instruction." *Meek*, 421 U.S. at 372 n.22.

Second, the Title I program is encompassed in a single statute that provides aid to students in both public and nonpublic schools according to a fixed statutory formula. See 20 U.S.C. 6321(a), 6313(c). This obviates any possibility that the program might foster chronic controversy over the amount of aid to be given to nonpublic school students. Indeed, there is no indication in the record that

Title I has precipitated acrimonious debate in the political arena. By contrast, the program in *Meek* required aid for public and nonpublic school students through separate statutory schemes requiring separate annual appropriations decisions. See 421 U.S. at 352, 372. That perennial review process created risks of "repeated confrontation between proponents and opponents of the * * * program [and] * * * political fragmentation and division along religious lines" (*id.* at 372).

In sum, aside from the possibility that public school teachers might become influenced by the surrounding "atmosphere dedicated to the advancement of religious belief" (421 U.S. at 371)—a concern that, as we have suggested, is entirely hypothetical and surely should not be presumed—many of the important factors in *Meek* are not present in this case. Accordingly, *Meek* did not dictate the result in *Aguilar*, and does not prevent *Aguilar* from being overruled. Should the Court disagree, however, and conclude that the auxiliary services program invalidated in *Meek* is not distinguishable from this case, we believe that aspect of *Meek* should also be overruled.

C. Since *Aguilar*, The Court Has Returned To Its Previous Approach To Entanglement Problems

The Court's decisions subsequent to *Aguilar* have returned to the more restrained and practical approach to entanglement concerns. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Court rejected a facial constitutional challenge to the Adolescent Family Life Act (AFLA), 42 U.S.C. 300z *et seq.*, which provides for grants to public and nonprofit organizations, including organizations with religious affiliations, for services relating to adolescent sexuality and pregnancy. In rejecting the contention that the AFLA has a primary effect of advancing religion, the Court noted that the use of granted funds to promote

religious doctrine was contrary to the intent of the legislation, and that grantees are required to undergo evaluations of their services by the government "to ensure that federal funds are not used for impermissible purposes." 487 U.S. at 615.

Concerning entanglement, the Court observed that federal "monitoring of AFLA grants is necessary if the [government] is to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause." *Kendrick*, 487 U.S. at 615. Nonetheless, the Court concluded that, at least on the facial challenge presented there, where it could not be assumed that grants would necessarily be made to pervasively sectarian institutions, there was no basis for concluding that "this type of grant monitoring [would] amount to 'excessive entanglement.'" *Id.* at 617. Thus, in *Kendrick*—which concerned a program that, like the Title I program, does *not* require direct financial assistance to pervasively sectarian institutions—the Court found no basis for a presumption that the government would have to enmesh itself in disputes over religious doctrine or in church administration. The Court left open for remand whether, in particular cases, it might be shown that federal funds had been granted improperly to pervasively sectarian groups or had been used by recipients for religious activities. *Id.* at 620-622.[14]

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[14] In *Kendrick*, the Court suggested that *Aguilar* was a case about "aid to parochial schools," and that "the elementary and secondary schools receiving aid were 'pervasively sectarian.'" 487 U.S. at 616. With respect, we submit that *Aguilar*—and Title I generally—do not involve aid *to* parochial schools at all (unlike, for example, the Shared Time program invalidated in *Ball*). Whether or not the religious schools in New York City are pervasively sectarian, those schools would not "receiv[e] aid" under Title I even if the instructional services were delivered inside their schools. Accordingly, as was true in *Kend-*

In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), the Court upheld the use of public funds to pay for a sign-language interpreter to accompany a deaf child in classes at a Catholic high school. Although the school district in that case argued that *Meek* prohibited the use of public funds for such a purpose, the Court rejected such a broad reading of *Meek*, and stated that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Id.* at 12-13. Although the Court did not expressly discuss the entanglement doctrine, it distinguished *Meek* as a case in which the religious schools were "reliev[ed] * * * of an otherwise necessary cost of performing their educational function," *id.* at 12, a description that cannot apply to this case, since Title I services must be supplementary.

Finally, in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994), five Justices expressly criticized *Aguilar* as inconsistent with the Court's Establishment Clause jurisprudence. Justice O'Connor stated that the Court "should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, towards religion." *Id.* at 717-718 (opinion concurring in part and concurring in the judgment). Justice Kennedy suggested that *Aguilar* "may have been erroneous," and that "it may be necessary for [the Court] to reconsider [that decision] at a later date," in order to remove the constitutional cloud from a "neutral aid scheme, available to religious and nonreligious alike," such that minority religions "would have no need to seek special accommodations." *Id.* at 731 (opinion concurring in the judgment).

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rick, the Court here need not consider any entanglement concerns raised by aid to pervasively sectarian institutions.

Justice Scalia, joined by the Chief Justice and Justice Thomas, "heartily agree[d]" that *Aguilar*, "so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity." *Id.* at 750 (dissenting opinion).

Kendrick and *Zobrest*, as well as the separate opinions in *Kiryas Joel*, recognize that the question of entanglement is, inevitably, related to the question of impermissible religious effects. If there is no serious concern that the benefits of a secular program will advance religion—for example, because the program remains firmly under state control and must be put to exclusively secular purposes—then the danger of entanglement is likely to be minimal as well. On the other hand, there may be situations in which—because of the direct participation of religiously affiliated institutions in a program—it can be shown that the prevention of an impermissible effect (the use of public funds to inculcate religious doctrine) requires intrusive state supervision of a religious institution. See, *e.g.*, *Lemon*, *supra*. That, however, is fundamentally an empirical question, which cannot be answered *a priori*. Nor should any danger of entanglement be assumed where the inculcation of religious doctrine is highly implausible—as here, where the services are delivered by public school personnel, not teachers dedicated to the spiritual mission of a religious school.

D. *Aguilar* Has Had Serious Adverse Economic and Educational Effects

In contrast to the insubstantial danger that public and religious school authorities will become enmeshed in divisive conflict should public school teachers resume delivery of Title I services in nonpublic schools is the very real cost to the education of both public and nonpublic school children that was made necessary by the decision in *Aguilar*. The alternatives to instruction at a child's own school —computer-assisted instruction, instruction in a rented unit, transportation to a public school—are often less effective. The attendant financial costs, moreover, are considerable, and in a world of finite resources, money spent for renting a neutral site means less money for instruction. Those costs, of course, would have to be borne if the Constitution required them, but for the reasons we have given, we believe that they are not required. And since they are not, the very real loss to the educational opportunities for needy and failing students presents a compelling reason for overruling *Aguilar*.

The considerable costs of *Aguilar*, in both educational and economic terms, have been documented. An assessment of Title I services delivered to private school students commissioned by the Department of Education in 1993 concluded that *Aguilar* "makes it difficult to achieve qualitative equitability" for nonpublic school students and "will continue to make equitability a problematic objective." United States Dep't of Education, *Chapter 1 Services to Private Religious School Students* viii (Aug. 1993) (lodged with the Clerk). That study observed that "vans and portable classrooms can be cramped and noisy, permitting little movement or activity and typically providing limited space for storing materials and supplies," and that "[i]nadequate heating, noise from electrical

generators or traffic, immovable tables and benches, and physical isolation test the inventiveness of even the most seasoned and creative teachers." *Id.* at 21. (One case study of "van teaching" noted that the class ended with the teacher leading the children "out into the cloudy 10-degree day and across 100 yards of an ice-covered parking lot to return to their school." *Id.* at 23.) The study also noted that transportation of religious school students to other sites raises concerns about the students' safety and conflict with their schools' instruction schedules, and that computer-assisted instruction has considerable disadvantages, including the physical isolation of the students and inadequate communication about student work and progress. *Id.* at 33-34. See also H. R. Rep. No. 95, 100th Cong., 1st Sess. 30-31 (1987) (noting substantial decrease in quality of Title I services provided to private school children since *Aguilar* was decided); S. Rep. No. 222, 100th Cong., 1st Sess. 14 (1987) (similar); J.A. 316-333, 614-640 (City's affidavits detailing flaws with all instructional methods tried for nonpublic school students since *Aguilar*).

Studies have also noted the considerable fiscal impact of *Aguilar* on school districts' ability to provide services to both public and private school students. A 1989 General Accounting Office study of the effects of *Aguilar* concluded that $105 million had been or would be spent on capital expenses since that decision to comply with *Aguilar* (not including expenditures in California). General Accounting Office, *Compensatory Education*: Aguilar v. Felton *Decision's Continuing Impact on Chapter 1 Program* 2-3 (1989) (lodged with the Clerk); see *id.* at 18-22. Those expenditures greatly exceeded a 1989 appropriation of $19.8 million made by Congress to assist school districts in paying for compliance with *Aguilar*. *Id.* at 2,

22-23.[15] New York City's affidavits also demonstrated that compliance with *Aguilar* is very costly. J.A. 333, 336-337 ($93 million in 1986-1994), 651-657.

Experience has therefore shown that *Aguilar* has led to considerable cost to education and the public fisc but has yielded little constitutional benefit, in the sense of preventing any real entanglement between governmental and religious institutions. The constitutional value of ensuring that government does not advance or become enmeshed in religion simply does not require that public school teachers be forbidden from entering a religious school to deliver a purely secular program firmly under state control. Accordingly, and in light of the importance of equal educational opportunity, we submit that *Aguilar* should be overruled.

II. RULE 60(b) IS A PROPER VEHICLE FOR OBTAINING THE RELIEF PETITIONERS SEEK

The petitioners' requests that *Aguilar* be overruled come to this Court in an unconventional posture, on certiorari from the lower courts' refusal to vacate an injunction that was entered on remand from this Court's prior decision in the same case. As we explained above, decisions subsequent to *Aguilar* (*Kendrick* and *Zobrest*), followed by the separate opinions in *Kiryas Joel*, indicate that *Aguilar* is inconsistent with the Court's entanglement decisions both before and since. That circumstance warrants reexamination of *Aguilar* by this Court. The lower courts were, of course, bound to follow this Court's directly controlling precedent, as they recognized. But

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[15] Because of the high costs of complying with *Aguilar*, Congress has continued to authorize and appropriate considerable sums to assist LEAs in that compliance. See 20 U.S.C. 6321(e), 6302(e). We are informed that Congress has appropriated about $300 million since Fiscal Year 1989 for that purpose.

this Court may nonetheless reconsider and overrule *Aguilar* on review of the lower courts' denial of relief under Rule 60(b).

A. This Court May Reconsider *Aguilar* On Review Of The Lower Courts' Denial Of Relief Under Rule 60(b)

1. Rule 60(b) "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1460 (1995) (quoting *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)). "Since Lord Bacon's day a decree in equity may be reversed or revised for error of law, * * * [a]nd this head of equity jurisdiction has been exercised by the federal courts from the foundation of the nation." *Hazel-Atlas*, 322 U.S. at 259 (Roberts, J., dissenting).

There can be no dispute, therefore, that federal courts have the authority under Rule 60(b) to vacate injunctive relief that is no longer required in light of intervening decisional law. That much was settled by *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 433-435 (1976), where the Court held that a district court should have modified a school desegregation decree forbidding any "majority minority" schools, once this Court held, in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), that the Equal Protection Clause does not impose such an inflexible requirement in school desegregation cases. Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 390 (1992) (district court has authority, under appropriate circumstances, to modify terms of consent decree no longer required by decisional law). "[A] sound judicial discretion may call for the modification of

the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen," and "the court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.'" *System Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO* v. *Wright*, 364 U.S. 642, 647 (1961) (quoting *United States* v. *Swift & Co.*, 286 U.S. 106, 114-115 (1932)); see also *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435-436 (1856) (holding that injunction should not be enforced because of intervening changes in statutory law).

Rule 60(b) therefore permits a district court to vacate an injunction in light of changes in this Court's decisions, as long as there is no directly controlling precedent of this Court that continues to mandate that injunction. Assume, for example, that in this case, respondents had brought their constitutional challenge to Title I in 1978, that the district court had ruled in their favor based on *Meek* (a similar but not identical case) and entered injunctive relief, and that the injunction had not been appealed. Had this Court never decided the precise issue raised in *Aguilar*, the district court could have looked to *Kendrick* and *Zobrest*, concluded that the approach taken to entanglement problems in *Meek* no longer prevailed in this Court, and vacated an injunction forbidding the expenditure of Title I funds for the salaries of public school teachers who deliver supplemental services in religious schools.

The difficulty here arises from the fact that the Court has decided the precise issue in this very case. Even if this Court would not decide that issue in the same way today, the lower courts would be bound to follow this Court's directly controlling decision. *Rodriguez de*

Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); see also *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425, 427-428 (1978) (per curiam). The lower courts' obligation in this case to follow *Aguilar*, however, followed from *stare decisis* and law of the case, and not from principles of finality of judgments or a lack of authority under Rule 60(b).[16] As the Court made clear in *Standard Oil Co. of California* v. *United States*, 429 U.S. 17 (1976) (per curiam), a district court may entertain a motion for relief from its judgment under Rule 60(b) even if that judgment has been affirmed by this Court; "[l]ike the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district court is not flouting the mandate by acting on the motion." *Id.* at 18.

This Court, however, has the authority to reconsider its own precedents, notwithstanding the doctrines of *stare decisis* and law of the case. Neither doctrine is an "inexorable command," and the Court has overruled its decisions when they were shown to be incorrectly reasoned and inconsistent with other decisional authority. See *Payne*, 501 U.S. at 827-829; *Fulton Corp.*, 116 S. Ct. at 860-861; *United States* v. *International Business Machines Corp.*, 116 S. Ct. 1793, 1811-1812 (1996) (Ginsburg, J., dissenting). Appellate courts (including this Court) have the authority to reconsider their precedents even in the same case, for

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[16] Indeed, once this Court decided *Aguilar*, all district courts in the country were bound by that decision, whether or not they were faced with pending litigation challenging the constitutionality of Title I. That is true even though later cases of this Court might have eroded *Aguilar*. See *Rodriguez*, 490 U.S. at 484 ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls.").

law of the case, like *stare decisis*, is a rule of policy rather than authority, and courts may depart from the law of the case when "controlling authority has since made a contrary decision of the law applicable to [the] issues." *White* v. *Murtha*, 377 F.2d 428, 431-432 (5th Cir. 1967). See *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912) (law of the case "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power"); *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (same). Cf. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 446 (1992) ("Of course, we surely have the power to accede to Oklahoma's request at this late date * * * to depart from our prior rulings."); *Arizona* v. *California*, 460 U.S. 605, 618 (1983).

It is not dispositive that the standard of appellate review of denials of relief under Rule 60(b) is frequently referred to as "abuse of discretion." See *Wright*, 364 U.S. at 648. As the Court has explained, a district court "abuses its discretion" whenever it makes a decision based on erroneous legal principles. See *Koon* v. *United States*, 116 S. Ct. 2035, 2047 (1996); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Thus, if this Court determines that *Aguilar* is no longer good law, it may announce the correct rule of law and direct the lower courts to grant the requested relief, even though the lower courts could not have done so on their own, in anticipation of that decision.

There is, to be sure, a legitimate concern that parties bound by injunctions might invoke Rule 60(b) for the purpose of obtaining appellate reconsideration of a precedent, even when there is little likelihood that the appellate court will in fact reverse itself. In our view, however, those concerns are adequately met by the doctrines of *stare decisis* and law of the case, which ensure that courts do not lightly reconsider their legal rulings. Meritless contentions that precedents should be overruled

will be answered by decisions refusing to take that step. There is no need for an additional door-closing device to prevent courts from correcting earlier errors of law. That point is well shown by cases like this one, in which petitioners seek relief from a judgment based on a decision of this Court that has been called into question, but not expressly overruled, by subsequent decisions of this Court, and that imposes significant educational and economic costs. In such a circumstance, this Court should not be disabled from reexamining its decision.

2. It is doubtful whether, absent the avenue for relief under Rule 60(b) that petitioners have invoked, this Court would ever be presented with a suitable vehicle for reconsideration of *Aguilar*. As we have noted (p. 6 n.6, *supra*), private plaintiffs have challenged the provision of Title I services to religious school students even after *Aguilar* as inconsistent with the Establishment Clause, but those contentions have been uniformly rejected in the lower courts. The losing plaintiffs have not sought this Court's review, and, because the school districts and the Secretary prevailed in those cases, there has been no opportunity to request this Court to reconsider *Aguilar*.[17]

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[17] In *Helms* v. *Cody*, 856 F. Supp. 1102 (E.D. La. 1994), a district court invalidated Louisiana's special education statute, insofar as it allowed state-paid teachers to teach inside pervasively sectarian schools. *Id.* at 1121-1122. The court subsequently upheld the application in one parish of a federal program under which both public and nonpublic schools receive instructional equipment. *Helms* v. *Cody*, 1997 WL 35283 (E.D. La. Jan. 28, 1997). Even if there might be cases pending that are somewhat similar to *Aguilar*, such cases do not necessarily present suitable vehicles for full reconsideration of *Aguilar* by this Court. As we have explained, each of this Court's entanglement decisions is crucially dependent on the facts of the case, and there might be significant factual differences between a current state program and Title I, just as there were significant differences between the programs at issue in *Meek* and *Aguilar*. Indeed, the district court that invali-

Further, because the Secretary of Education recognizes the binding authority of *Aguilar*, he is obligated to deny funds to LEAs for the purpose of sending public school teachers to deliver Title I services in religious schools. Parties other than the ones here, such as a school district other than New York, might conceivably bring an action against the Secretary to challenge such a funding decision, but the Secretary's decision would undoubtedly be upheld as consistent with, if not compelled by, *Aguilar*, and in any event all lower courts in the Nation would be obligated to follow *Aguilar*. And because the Secretary supports reconsideration of *Aguilar*, there would be a problem in such a case of identifying a nongovernmental defendant ready, willing, and able to undertake the cost of presenting a full defense against reconsideration of *Aguilar*, and of preparing a record to that end. The district court in this case, however, compiled a full record when the case was previously litigated, and the City updated the record with an extensive affidavit in support of its Rule 60(b) motion. See 96-553 Pet. App. A27-A101.

The only other possible method by which the continuing vitality of *Aguilar* could be tested directly would be for the City of New York to place itself in contempt by deliberately violating the terms of the district court's injunction, and then to seek review of the contempt sanction in the appellate courts, including this Court. In practical effect, however, that could not occur, because the Secretary of Education would not provide the City with funds for a Title I program that included sending teachers into religious schools in violation of *Aguilar*. Moreover,

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dated the Louisiana special education program relied principally on *Ball* rather than *Aguilar*, and it found that the State's financial assistance "is given directly to the schools themselves, and not indirectly through the parents or students." 856 F. Supp. at 1120-1121.

this Court has held that one seeking relief from an injunction *must* ordinarily move for such relief rather than disobey the injunction and place himself in contempt. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Therefore, as the district court found, a motion for relief from an injunction is "far preferable" to a requirement that the City place itself in contempt. Pet. App. 9a.[18]

B. There Is No Deficiency In The Record Preventing This Court's Reconsideration of *Aguilar*

The record in this case is adequate to permit this Court to reconsider *Aguilar*. That record includes the entire record compiled in the earlier proceedings in this case. Petitioners also submitted, with their Rule 60(b) motions, affidavits detailing the additional financial costs necessary to implement post-*Aguilar* delivery methods for Title I services and explaining the educational deficiencies in those methods. J.A. 306-346, 601-657; see also Pet. App. 17a-19a (statement by Secretary of Education about

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[18] If the Court has doubts about the appropriateness of Rule 60(b) as a mechanism for reconsideration of *Aguilar*, we suggest that the Court treat the petitions for a writ of certiorari as petitions for rehearing of the Court's prior ruling in this case (see, *e.g.*, *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam) (granting petition for rehearing three years after prior denial of rehearing)) or as motions to recall and modify the Court's prior judgment (see, *e.g.*, *Cahill* v. *New York, New Haven & Hartford R.R.*, 351 U.S. 183 (1956) (granting motion to recall and amend the Court's judgment)). Cf. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 400 U.S. 939 (1970) (treating application for a stay and opposition thereto as a petition for a writ of certiorari and opposition thereto, and granting certiorari). The Court has, in the past, reconsidered and reversed prior decisions on petitions for rehearing. See *Reid* v. *Covert*, 354 U.S. 1 (1957); *Jones* v. *Opelika*, 319 U.S. 103 (1943) (per curiam). In one way or another, we believe that this Court necessarily has the power to modify a prior judgment, such as *Aguilar*, that has continuing, prospective effect.

adverse educational effects of post-*Aguilar* instruction methods).

In the courts below, respondents suggested that the record was deficient in two ways. First, they argued that there is need for an evidentiary hearing on the financial condition of the Catholic schools whose children participate in Title I, presumably to focus on whether Title I funding is necessary to the schools' survival. Resp. C.A. Br. 25-26. That issue, however, has nothing to do with whether instruction inside religious schools is constitutional. Title I services are not intended to aid private schools, and they are supplementary to the basic curriculum of those schools. Hence, no record development is necessary on that issue.

Second, respondents argued below that there are open issues regarding the religious mission of the Catholic schools where Title I services would be delivered. Resp. C.A. Br. 27. There is in fact no genuine dispute on that issue, which was extensively addressed in the affidavits submitted in the first round of *Aguilar* litigation (see J.A. 256-267) and, again, in affidavits filed in support of the Rule 60(b) motions (see J.A. 659-669, 684-685). In any event, we may assume for present purposes that the Catholic schools have a religious mission and, indeed, are pervasively sectarian, for that does not affect the outcome of this case.[19] The decision in *Aguilar* was based on a concern that public school teachers engaged in secular education would be influenced, wittingly or unwittingly, by the

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[19] The dissenters in *Aguilar* notably did not take issue with the Court's characterization of the religious schools in New York as "pervasively sectarian," 473 U.S. at 412. Rather, the dissenters emphasized that there was no demonstrated reason to conclude that "a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school." *Id.* at 427 (O'Connor, J., dissenting).

surroundings of a religious school, and that close supervision of the religious school would be necessary to ensure that this did not occur. But as we have explained, there is no basis in the record for the counterfactual hypothesis that public school teachers would lapse into subtle religious indoctrination. Further, any oversight of teachers to ensure that their instruction remains secular would not require interference with the religious mission of the schools, since a public school authority need only supervise its own employees—not the parochial schools—to make sure that the state keeps clear of church affairs.[20]

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[20] If the Court should conclude that further evidence or findings would be appropriate regarding the circumstances of the Title I program as it is or would be administered in New York, the Court could vacate the judgment of the court of appeals and remand the case with instructions to the district court for further proceedings on petitioners' Rule 60(b) motion under the principles announced in the Court's decision.

CONCLUSION

The Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), should be overruled. Accordingly, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions to vacate the injunction.

Respectfully submitted.

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FEBRUARY 1997

APPENDIX

TITLE I, PART A
POLICY GUIDANCE

IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

[SEAL OMITTED]

U.S. DEPARTMENT OF EDUCATION
Office of Elementary and Secondary Education
Compensatory Education Programs

April 1996

* * * * *

PROVIDING SERVICES TO ELIGIBLE PRIVATE SCHOOL CHILDREN

* * * * *

[p. 13]

Q5. If a school in the attendance area in which eligible private school students reside is operating a schoolwide program, are private school students to be offered a schoolwide program?

A. No. Because private schools are not eligible for Title I services, schoolwide programs may not be operated in private schools. However, eligible private school children residing in an area served by a schoolwide program school must be offered equitable services.

Q6. May an LEA provide services to private school children that are not equitable to those provided to public school children, if, after receiving an offer of equitable services, the private school officials or parents choose to have the children participate in only some of the services?

A. The statute requires that an LEA offer equitable services to private school children; it does not require that private school children accept or participate in all those services. If private school officials or parents choose to have their children participate in only some of those services, and decline participation in others, the LEA will have met its responsibility by providing those services in which private school children wish to participate. LEAs should continue to offer equitable services in future years, however, rather than offering only those services in which children participated in the past.

Q7. When a child residing in a Title I attendance area in one LEA attends a private school in another LEA, which LEA, if any, is responsible for service the child?

A. The LEA in which the child resides is responsible to provide services for the child. The LEA may, however, arrange to have services provided by another LEA, reimbursing that LEA for costs.

Q8. May an LEA establish a minimum number of private school children selected for the program in order to establish a Title I program near the private school? If so, what is the LEA's responsibility to serve children attending private schools with fewer than that minimum number?

A. Section 1120(a) of Title I requires that LEAs provide for the participation, on any equitable basis, of eligible children enrolled in private schools. The requirement applies regardless of the number of children attending a private school. However, when the number of eligible children at one location is very small, the cost of establishing certain types of programs to serve them may be prohibitive, especially when these children may be from several grades or have different educational needs. In this case, other options should be considered. For instance, if it is feasible and equitable, LEAs may adopt methods, such as take-home computer programs, individual tutoring programs, or professional development activities.

* * * * *